90-1948

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Supreme Court, U.S.
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Docket No. _____

UNITED STATES SUPREME COURT

October, 1990 Term

MARY T. RAM
Petitioner-Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WORKS,
TOWN OF CHARLTON
Appellees

Petition for Writ of Certiorari to the

Supreme Judicial Court of Massachusetts

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. When a state creates a statutory right to recovery against the state, does a thirty day statute of limitations within which a claim may be brought constitute a deprivation of procedural due process because the brevity of the limitations period does not provide a meaningful opportunity to exercise that right?

2. When a statute allows a plaintiff to recover damages from a state for physical injuries caused by the state's negligence, is a $4,000.00 cap (and $5,000.00 in the case of a municipality) on the state's liability so minimal as to be mere tokenism and not a good faith attempt to address liability, therefore rendering the intent of the statute without meaning and depriving said plaintiff of her due process rights to

recover on her claim, thereby depriving her of a state-created right?

3. When the highest court in a state dismisses a cause of action through summary judgment on the basis of the expiration of a short statute of limitations and not on the merits, and further, when that court does not consider the merits of a legal theory that would not have been disposed of through an expired statute of limitations, is a party denied her rights of substantive due process by not being allowed to have her cause of action judged on its merits?

LIST OF PARTIES

A) Petitioner-Appellant: Mary T. Ram

B) Appellees: Commonwealth of Masschusetts, Department of Transportation; Commonwealth of Massachusetts, Department of Public Works; Town of Charlton.

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REFERENCE TO COURT OPINIONS

A) This case was first brought in the Superior Court of the Commonwealth of Massachusetts, with Civil Action Number 86917. Summary judgment was granted in favor of Defendants. The decision came down on November 22, 1988.

B) The case was appealed to the Appeals Court of the Commonwealth of Massachusetts, with Civil Action Number 89-P-886. It was removed sua sponte by the Supreme Judicial Court of the Commonwealth of Massachusetts and assigned No. SJC 5484. On March 7, 1991, the Supreme Judicial Court affirmed the decision of the Superior Court granting summary judgment to Defendants. A petition for rehearing was sent to the Supreme Judicial Court. Rehearing was denied on March 27, 1991.

GROUNDS OF JURISDICTION FOR REVIEW

A) Plaintiff claims violations of the Rights to Due Process as set forth in the Fifth and Fourteenth Amendments of the U.S. Constitution.

B) Plaintiff seeks review of an allowance of Summary Judgment handed down by the Massachusetts Supreme Judicial Court on March 7, 1991.

C) Petition for Rehearing was denied on March 27, 1991.

D) Jurisdiction is conferred on this Court by Article III of the Constitution of the United States, and by United States Code chapter 28 section 1257.

E) Review is sought pursuant to Supreme Court Rule 10.1(c), allowing review: "When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has

decided a federal question in a way that conflicts with applicable decisions of this Court."

## CONSTITUTION OF THE UNITED STATES

### ARTICLE III SECTION 1

Judicial power; tenure of office

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

### ARTICLE III SECTION 2

Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States

shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States, between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV SECTION 1

Citizenship rights not to be abridged by states

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 28 SECTION 1257

State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

## MASSACHUSETTS GENERAL LAWS

Chapter 81, Section 18 Defects in highways; liability

The Commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four, except that the Commonwealth shall not be liable for injury sustained because of the want of a railing in or upon any state highway, or for injury sustained upon the sidewalk of a state highway or during the construction, reconstruction or repair of such highway. The amount which may be recovered for any such injury shall not exceed one fifth of one percent of the valuation of the town in which the injury was received, nor shall it exceed four thousand dollars. Notice of the injury as required by law shall be given to a member of the department.

Chapter 84, Section 15 Personal injuries or property damage from defective ways

If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient

railing in or upon a way, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town or person by law obliged to repair the same, he may, if such county, city, town or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city or town more than one fifth of one percent of its state valuation last preceding the commencement of the action nor more than five thousand dollars; nor shall a country, city or town be liable for an injury or damage sustained upon a way laid out and established in the manner prescribed by statute until after an entry has been made for the purpose of constructing the way, or during the construction and repairing thereof, provided that the way shall have been closed, or other sufficient means taken to caution the public against entering thereon. No action shall be maintained under this section by a person the combined weight of whose carriage or vehicle and load exceeds six tons.

Chapter 84, Section 18 Notice of injury; contents; limitation of action

A person so injured shall, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way in repair, notice of the name and place of residence of the person injured, and the time, place and cause of said injury or damage; and if the said county, city, town or person does not pay the amount thereof, he may recover the same in an action of tort if brought within three years after the date of such injury or damage. Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the name or place of residence of the person injured, or the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The words "place of residence of the person injured", as used in this and the two following sections, shall include the street and number, if any, of his residence as well as the name of the city or town thereof. Failure to give such notice for such injury or damage sustained by reason of snow or ice shall not be a defence under this section unless the defendant proves that he was prejudiced thereby.

Chapter 229, Section 2 Wrongful death; damages

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstance that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonable expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this

section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. An action to recover damages under this section shall be commenced within three years from the date of death or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

Chapter 258, Section 2 Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the

same extent as a private individual under like circumstances, except that public employers shall not be liable to levy or execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of one hundred thousand dollars. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject

matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstance, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.

Chapter 258, Section 10 Applications of sections 1 to 8

The provisions of sections one to eight, inclusive, shall not apply to:

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused;

(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental stress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations;

(d) any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer.

## STATEMENT OF THE CASE

Plaintiff was driving her car at night along a public way when a sudden, unexpected, and unforeseen sharp curve in the road caused her to be unable to navigate the roadway. Her vehicle left the road and crashed into a tree. Plaintiff suffered greivous injuries, including several spinal fractures. Plaintiff was not under the influence of any intoxicating substances at the time of the accident. The accident was caused solely by the unexpected and dangerous contour of the road.

Plaintiff brought suit against the Town and the Commonwealth, alleging negligence in the design and maintenance of the road (actionable under M.G.L. c. 81 and M.G.L. c. 84) as well as negligence in the failure of the State to observe a public duty (actionable under the Massachusetts Tort

Claims Act, M.G.L. c. 258) to rectify the known dangerous condition in some manner and thereby render the road safe to the public (even if this meant shutting it down). Although Plaintiff proceeded on a negligence theory, the Superior Court held that Plaintiff's claim was only cognizable under the road defect statutes, and not under the negligence statute.

The decision was appealed and removed sua sponte to the Supreme Judicial Court. At this point the claims of Constitutional violations were asserted, namely, that the road defect statutes under which the Courts rendered their decisions denied Plaintiff her Due Process rights as guaranteed by the Constitution.

Discovery, including a letter from the Town of Charlton to the Governor of the Commonwealth of Massachusetts, Michael S. Dukakis, revealed that the dangerous

conditions were well known by the Town due to numerous accidents at the same site prior to Plaintiff's accident. As a result of these accidents the Town had contacted the state government for funds to straighten the road and render it less dangerous. The State was therefore apprised of the dangerous situation. The Town's request was made prior to Plaintiffs' accident.

Defendants Town and State sought summary judgment under M.G.L. c. 81 and M.G.L. c. 84, the two state statutes that assessed liability to the State for harm suffered due to a defect in a roadway, established a thirty (30) day statute of limitations within which to bring the claim, and provided for a maximum damage award of four and five thousand dollars, respective to each statute. Plaintiff's claim was not brought within thirty days.

Plaintiff alleged that, the defect in

the road notwithstanding, the proper statute to impose liability was the Massachusetts Tort Claims Act, which explicitly holds the state liable for certain actions of negligence. The relevant statute of limitations is two years, with which Plaintiff complied.

The Superior Court accepted Defendants' argument, rejected Plaintiff's reasoning, and granted summary judgment to Defendants on the basis of Plaintiff not bringing her claim within thirty days. Plaintiff appealed the decision in the Appeals Court. The Supreme Judicial Court removed the case sua sponte, affirmed the decision of the Superior Court in granting summary judgment to Defendants, and denied that the road defect statutes were unconstitutional. Plaintiff petitioned the Supreme Judicial Court for a rehearing of its decision. The petition was denied.

## ARGUMENT

Plaintiff Mary Ram ("Ram") contends that she has been denied her procedural and substantive rights of Due Process guaranteed by the Fifth Amendment of the U.S. Constitution as applied to the states by the Fourteenth Amendment of the U.S. Constitution.

### I. A THIRTY DAY STATUTE OF LIMITATIONS IS UNREASONABLE AND IS A VIOLATION OF A CLAIMANT'S RIGHTS TO PROCEDURAL DUE PROCESS.

Ram brought an action against Defendants Commonwealth of Massachusetts and the Town of Charlton (hereinafter collectively referred to as "State") as a result of injuries suffered and damages incurred after she was involved in an accident on a road in Charlton. Although she brought her cause of action under the

Massachusetts Tort Claims Act, her case was dismissed through summary judgment pursuant to M.G.L. c. 84, which assesses liability to the State for damages incurred as a result of defects in a public way. M.G.L. c. 84 provides a thirty day statute of limitation within which to present a claim to the State, while the Mass. Tort Claims Act provides a two year statute of limitations. Ram did not present her claim within the thirty days, but did present her claim within the two year statute of limitations of the statute under which she sought relief.

Ram avers that, even though the State has granted a right to recovery under M.G.L. c. 84, a statute of limitation period as brief as thirty days is inappropriate and renders any grant of rights under the statute ineffective and illusory. The brevity of the time period violates her

rights to procedural due process and deprives her of an adequate opportunity to be heard and press her claim under the statute. "To find a violation of procedural due process, it must appear that a state has failed to afford procedures adequate to protect a person's rights from unreasonable or arbitrary deprivation." Intern. Ass'n of Firefighters, Etc. v. City of Sylacauga, 436 F.Supp. 482, 489 (1977), citing to Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976); Slochower v. Board of Education, 350 U.S. 551 (1956). "'"[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms."'" Logan v. Zimmerman Brush Co., 455 U.S. 422, at 432, citing Vitek v. Jones, 445 U.S., at 490-491, n.6, quoting Arnett v. Kennedy 416 U.S., at 167 (opinion concurring in part).

The operative purpose behind statutes

of limitation is to provide a window of opportunity within which a party may pursue a claim without exposing a potential Defendant to indefinite liability. See e.g. United States v. Kubrick, 444 U.S. 111, 117 (1979). If a statute of limitations does not serve these two purposes, it is arbitrary and without meaning. The Legislature imposes the length of time that it deems appropriate, and the Court should not stand in the way of its attempts to promote the expeditious presentation and resolution of claims. Id.

The value of statutes of limitation has long been recognized. "Statutes of limitation are vital to the welfare of society and are favored in the law. . . . An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they

supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar." Wood v. Carpenter, 101 U.S. 135 (1879).

The Supreme Court has commented on the sufficiency of a statute of limitations in the context of proving paternity of illegitimate children. While this category of claimant may be substantially different than Ram, and recognizing that the circumstances surrounding attempts to prove paternity are completely different from Ram's attempts to press her claim, the basic reasoning of the Court regarding statutes of limitation and their purpose applies within the context of Ram's case.

The Court has considered two basic elements in evaluating a statute of limitations. "[T]he period . . . has to be long enough to provide a reasonable

opportunity for those with an interest in illegitimate children to bring suit on their behalf; and any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims." Pickett v. Brown, 462 U.S. 1 (1982), citing to Mills v. Habluetzel, 456 U.S. 91, at 99-100; see also Clark v. Jeter, 486 U.S. 456 (1987) (deciding that a six year statute of limitations was insufficient for the purpose of the statute). Analagously, Ram contends that thirty days is an insufficient time to allow a claimant who may have suffered a catastrophic injury to press suit to recover damages. If a claim brought within two years is not deemed stale under the Mass. Tort Claims Act, this justification cannot legitimize a thirty day statute of limitations.

The unreasonable nature of a thirty day

statute of limitation, however, is highlighted by the State's own argument in favor of it. The Town of Charlton examined the benefits of statutes of limitations, citing expediency and a desire to be free from stale claims as a justification for them. See Brief for the Defendant-Appellee, Town of Charlton, Appendix D(c) at 124. In support of its argument the State cites to M.G.L. c. 260, §2B and M.G.L. c. 161A, §21, whose statutes of limitation were both upheld by the Massachusetts Supreme Judicial Court. Id. at 131. The statutes of limitation, however, extended for six and two years, respectively. To seek to justify a statute of limitations by comparison to statutes of limitation seventy-two and twenty-four times greater than the statute of limitations in question is an unreasonable attempt at persuasion. The fact is that the short statute of limitations is

an "'established state procedure' that destroys [Ram's] entitlement [to a State created right] without according [her] proper procedural safeguards." Logan at 436.

Try as it might, the State cannot squeeze a "countervailing state interest of overriding significance", Boddie v. Connecticut, 401 U.S. 371, 377 (1971), out of the statute that justifies a time limit that deprives Ram of a "meaningful opportunity to be heard." Id. The State claims that the Court should not judge the actions of the Legislature when it mandates a statute of limitations "[w]hen a statute does not burden a fundamental right[.]" See Brief for the Defendant-Appellee, Town of Charlton , Appendix D(c) at 132. This statute, however, does burden a fundamental right, to wit, the right to have a meaningful opportunity to press a claim. See e.g. Logan at 428. It is not unreasonable

for a claimant to expect to have more than thirty days to present a claim, especially in circumstances where grievous bodily harm may have ensued or mental or reasoning faculties may have been temporarily impaired or suspended. As the State suggested, neither is it unreasonable to expect a plaintiff to bring a claim within two years. See Brief for the Defendant-Appellee, Town of Charlton, Appendix D(c) at 131. To expect a claimant to bring a claim within thirty days of being involved in a serious automobile accident, however, is both unreasonable and a violation of the claimant's rights to due process. A statute of limitations should provide a Plaintiff adequate time within which to pursue a cause of action, as well as protecting a Defendant from indefinite liability. A statute of limitations that is so limited as to foreclose any meaningful and reasonable

opportunity to be heard is functionally useless. It provides false hope for the possibility of a legal remedy, and such an illusory promise serves no legal, social, judicial or equitable purpose.

The reasons advanced by the State to justify the short statute of limitations do not withstand scrutiny. It claims that the brief time period better allows the State to respond to the dangerous conditions. Brief for the Defendant-Appellee, Town of Charlton, Appendix D(c) at 125. This assertion does not acknowledge that many accidents had occurred at the same location over the prior several years. The State already had notice of the conditions, but still failed to take any measures to correct them. The "obligation on the municipality to keep its ways in repair" imposed by the statute, id., have obviously not been met, and the State's own brief shows how

impractical and irrelevant the statute is. The State claims that the thirty days gives it time to gather adequate funds "for the payment of meritorious claims and to be able to budget for future claims." Id. In an era of bureaucratic entanglements, such an assertion of efficiency must certainly be met with skepticism.

Any relationship between a short statute of limitations and the justifications the State propounds is tenuous. The expediency with which a claimant presents her claim has no relation to the expediency with which the State corrects the offending public way, as reality has demonstrated. The State knew of the deadly curve before Ram's accident and took no action whatsoever to correct it. Such inaction is not only a betrayal of the public trust, it served to deprive Ram of a basic constitutional right without affording

her the protection of her rights of due process. Similarly, the speed with which Ram presented her claim has no bearing on the State's ability or willingness to address it. While the claim should not be allowed to exist in a state of unresolved limbo forever, a meaningful opportunity to present it should be made available to Ram, if it is to made available at all. If the State has not rectified the situation after several years of numerous accidents, a thirty day statute of limitations certainly serves no purpose of providing prompt notice so that the State can attend to the dangerous situation.

The entire statute is arbitrary, and the Massachusetts courts have deprived Ram of her rights of Due Process by not allowing her to proceed under the applicable provisions of the Mass. Tort Claims Act.

## II. THE DAMAGE AWARDS CONTAINED IN THE ROAD DEFECT STATUTES ARE SO SMALL AS TO NOT BE RATIONALLY RELATED TO ANY POSSIBLE INTENT OF THE STATUTE.

Just as the statute of limitations cannot be justified by any rational relationship to a state interest, the $4,000.00 and $5,000.00 damage awards authorized by the statutes are likewise without any rational relationship to any possible state interest or intent. The statutory scheme conflicts with that announced in connection with the Massachusetts Tort Claims Act, namely to "ensure[] that a meaningful recovery will be available to victims of public employees' negligence, while simultaneously limiting a public employer's exposure to excessive liability." Hallett v. Town of Wrentham, 398 Mass. 550, 499 N.E.2d 1189 at 1194 (1986), quoting Irwin v. Ware, 392 Mass.

745, 772, 467 N.E.2d 1292 (1984).

It is entirely understandable that a state would want to limit the liability to which it could be exposed. For example, the $100,000.00 limit of the Mass. Tort Claims Act, while possibly not fully compensating a plaintiff for harm suffered, does offer a sufficient award to justify the state-created right of allowing its citizens to sue the State for the negligence of its agents. An award of $4,000.00 and/or $5,000.00, however, does not even begin to address potential legal and medical expenses. In the face of potentially severe or catastrophic injuries, these amounts are effectively meaningless. Even though the state has created a right of recovery against the state, the statute of limitations and the minimal damage awards serve only as a bar and a disincentive to the exercise of that right.

## III. THE STATE CREATED A STATUTORY RIGHT AND CAUSE OF ACTION AND ITS DENIAL OF THAT RIGHT AND CAUSE OF ACTION WITHOUT A MEANINGFUL OPPORTUNITY TO BE HEARD IS A VIOLATION OF RAM'S RIGHTS TO SUBSTANTIVE DUE PROCESS.

"To find a violation of substantive due process, it must appear that a state has unreasonably or arbitrarily deprived a person of a right to which he is otherwise entitled." Intern. Ass'n of Firefighters, Etc. v. City of Sylacauga, 436 F.Supp. 482, 489 (1977) citing to Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Dismissing a case on the basis of an unreasonably short statute of limitations does not allow a party the opportunity of seeking satisfaction on the substance of his case. If a statute of limitations is reasonable and a party does not act within its time constraints, that party cannot claim she was denied the full force and

justice of the law. If, however, a party does not have a meaningful time within which to file a claim she is being unreasonably deprived of a property right that the statute has established. A short statute of limitations does not have any bearing on the merits of a party's claim or on a state's ability to defend against it. The only thing a statute of limitations has a bearing on is whether a party brings a case within it or not.

"Our cases establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Boddie v. Connecticut, 401 U.S. 371, 379 (1970). Once a state creates a right, it cannot be "arbitrarily abrogated." Wolff v. McDonnell, 418 U.S. 539 (1973), see

also, Logan, supra. Since it serves no valid purpose, the short statute of limitations arbitrarily deprived Ram of a state-created right.

## IV. RAM DID NOT HAVE A CHANCE TO HAVE HER CASE DECIDED ON ITS MERITS BECAUSE THE COURT DID NOT ENTERTAIN HER ALTERNATE LEGAL THEORY.

Ram argued from the outset, when she commenced her case in Superior Court, that her argument was cognizable under the Massachusetts Tort Claims Act, M.G.L. c. 258. This act assesses liability against the State if a claim is brought within two years of its generation. Ram brought her claim within the two year period. Through arguments in the Superior Court and the Supreme Judicial Court, however, she has not been allowed to develop her theory under this statute. These courts set her case within M.G.L. c. 84 with a thirty day

statute of limitations, and dismissed it through summary judgment. At no time has Ram been allowed to have her case heard fully on its merits as it arises under the Massachusetts Tort Claims Act.

The decisions of the Massachusetts courts appear to be the result of their interpretation of Ram's argument. They seem to infer that she is attributing her accident to the poor and negligent design of the road and that she is contending that these circumstances put her case within the Act. Negligent design, as the courts have ably explained, is within M.G.L. c. 84. M.G.L. c. 84, however, deals exclusively with roadways. Ram's theory of negligence is not so narrowly circumscribed. She contends that, once the State had knowledge of the dangerous condition of the road, they were negligent in not taking steps to protect the public from the danger, and as

a result of the State's negligent omission to act and dereliction of a statutory duty, she was harmed. The operative consideration is not that her injury resulted from a poorly designed or maintained road, but that the State had an affirmative duty to keep its ways reasonably safe and convenient, see Myers v. Town of Lee, 8 Mass.App. 874, 391 N.E.2d 923 (1979); see also Johnson v. Town of Orange, 320 Mass. 336, 69 N.E.2d 587 (1946), and their negligent failure to observe that duty once they knew the road was dangerous directly resulted in her harm. The duty arose under M.G.L. c. 84, and would have stayed in M.G.L. c. 84 if Ram had alleged that the State was negligent in designing or maintaining the road, but once the allegation of a negligence that arose from not observing a statutorily imposed duty was asserted, the case fell under M.G.L. c. 258, the Mass. Tort Claims Act.

The fact that a road was involved becomes immaterial and coincidental to this particular theory. The situation would be no different under any of many conceivable circumstances where the State has a duty to act and does not do so (e.g. a policeman ignoring a crime in progress; a fireman leaving the scene of a fire; a District Attorney failing to prosecute when he has an abundance of evidence; etc.), and should be liable for its negligence.

In the hearing before the Supreme Judicial Court, Ram's counsel presented a hypothetical which illustrated the negligence theory. See Transcript of Oral Argument of John F. Kehoe before the Supreme Judicial Court, Appendix D(a), and the Letter to the Justices, Appendix D(b)(1). Mr. Kehoe used the illustration of a police officer on watch to prevent accidents at a fallen bridge (clearly a defect in a public

way under M.G.L. c.84) who, when his relief doesn't show up, elects to leave his post because he is annoyed and tired. Such an act is a separate incident of negligence cognizable under the Massachusetts Tort Claims Act, M.G.L. c. 258. His intervening negligent act is forever actionable under M.G.L. c. 258. The fact that people are later injured after driving off the fallen bridge does not place it back under M.G.L. c. 84. This is logically identical to the situation in the Ram case where the state knew that the road was dangerous and took no action. See Letter dated November 16, 1983 from Selectman Haebler to Governor Michael S. Dukakis, Appendix D(b)(2). The Supreme Judicial Court, however, continued to interpret the case as a road defect case and not as a State negligence case. This issue of state liability for its negligent acts is, depending on the circumstances and

location of the acts, addressed in two different ways by the road defect statutes and the Massachusetts Tort Claims Act.

It is irrational to treat a basic concept of State negligence and attendant damages awards in two widely disparate ways only because one instance of negligence takes place on a road and another takes place somewhere else, for example, in a school building (i.e. the first instance would be cognizable under the road defect statutes and the other would be cognizable under the Mass. Tort Claims Act). This reasoning effectively and arbirtrarily creates two categories of claimants, those who are injured on a road as a result of the State's negligence, and those who are injured elsewhere as a result of the State's negligence. That the treatment afforded to each category of claimant is so markedly different is a violation of the

disadvantaged claimant's rights to equal protection. The categorization of Ram's case as a road defect case by the Massachusetts Courts, and their failure to consider her theory in the light in which Ram presented it, deprived her of a meaningful chance to have her argument judged on its merits.

The statute also creates two groups of plaintiffs who are treated disparately according to the severity of the injuries they have received. If a claimant receives any degree of injuries due to defective road design or maintenance, but remains alive, no matter in what condition or state of physical existence, she is severely limited to recovery by M.G.L. c. 84. If, however, her injuries are so massive that she dies, then she, or her estate, is entitled to receive $100,000.00 under the Mass. Tort Claims Act. See M.G.L. c. 229 §2 in

connection with M.G.L. c. 258 §2; see also Sanker v. Town of Orleans, 27 Mass.App.Ct. 410, 538 N.E.2d 999 (1989); see also Hallett v. Town of Wrentham, 398 Mass. 550, 499 N.E.2d 1189 (1986). The discrepencies, inconsistencies and disparaties within the statutory framework that addresses the same basic issue of municipal negligence illustrate the arbitrary nature of the statutes concerned and the attendant injustice that is visited on a plaintiff who is unfortunate enough to be placed within one of the less generous statutes merely because he was injured on a public way instead of in a public building, or had the questionable good fortune to remain alive, even if as a quadripalegic.

"One of the major purposes of c. 258 clearly is to allow plaintiffs with valid causes of action to recover in negligence against governmental entities in

Massachusetts. A second, and equally important, purpose is to preserve the stability and effectiveness of government by providing a mechanism which will result in payment of only those claims against governmental entities which are valid, in amounts which are reasonable and not inflated." Vasys v. Metropolitan District Commission, 387 Mass. 51, 438 N.E.2d 836 (1982). The substance of Ram's cause of action has yet to be judged. The recourse promised by the law has been denied her. If there is "any reasonable doubt as to which of two statute of limitation applies to a particular action [, the doubt] is resolved in favor of the statute containing a longer period of limitations." Coast To Coast Stores, Inc. v. Citizens Bank, 676 F.Supp. 923 (E.D. Ark. 1987), citing to Broadhead v. McEntire, 19 Ark.App. 259, 720 S.W.2d 313 (1986). There is certainly a reasonable

doubt in this instance, and a balancing of the equities, as well as legal analysis, demands that Ram's cause of action fall under the Mass. Tort Claims Act with the longer statute of limitations.

The Supreme Court has recognized that "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication, [for example] . . . statutes of limitations." Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1981), citing to Chase Securities Corp. v. Donaldson, 325 U.S. at 314-316. The Court also recognized, that "the Fourteenth Amendment does require, however, . . . 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' Mullane v. Central Hanover Tr. Co., supra, at 313." Id., citing to Boddie v.

Connecticut 401 U.S., at 378.

Just as statutory procedures may deprive a plaintiff of her right to be heard, a failure to consider all valid alternative legal theories and arguments denies a plaintiff her right to have her case judged fully on its merits. "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Id. at 433. Ram never received a proper hearing on her alternative cause of action based on State negligence as the cause of her injuries and her right to recover damages under M.G.L. c. 258, the Mass. Tort Claims Act.

"[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Id. at 428. The State has granted plaintiffs the right

to press a claim against it. By ignoring and not analyzing the full scope of Ram's claim, the Massachusetts Supreme Judicial Court has deprived her of "a protected property interest" without a meaningful opportunity to be heard. See id. at 433, citing to Board of Regents v. Roth, 408 U.S. at 570-571, n.8. The full scope, substance and merits of Ram's case were not considered before the Supreme Judicial Court finally terminated her claim. It disregarded her cause of action under the Mass. Tort Claims Act claim by not fully and properly evaluating it in the context in which it was presented, and in so doing, violated her rights of Due Process.

## CONCLUSION

Ram seeks relief from the ruling of the Massachusetts Supreme Judicial Court which has deprived her of her Due Process rights as guaranteed by the Fifth and Fourteenth

Amendments of the U.S. Constitution. The severely restrictive thirty day statute of limitations deprives her of a meaningful opportunity to present her claim and is thus a violation of her procedural Due Process rights. The minimal damage award for potentially catastrophic injuries renders any recovery allowed under the statute meaningless and deprives her of a state-created property right without a proper hearing. Finally, the Supreme Judicial Court's failure to consider her alternate theory which would have allowed her a more reasonable period of time in which to file her claim and would have allowed her to seek a more just and meaningful recovery, is a violation of her substantive Due Process Rights.

# APPENDIX

Appendix A

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court for the Commonwealth

At Boston, March 7, 1991

In the case no. SJC - 5484

MARY T. RAM

vs.

TOWN OF CHARLTON & another

pending in the Superior Court Department of the Trial
Court for the County of Suffolk No. 86917

Ordered, that the following entry be made in the docket;
Judgments affirmed.

S-5484 S.J.C.

MARY T. RAM vs. TOWN OF CHARLTON & another.[1]

Suffolk. December 6, 1990. - March 7, 1991.

Present: Liacos, C.J., Abrams, Nolan, O'Connor, & Greany, JJ.

Municipal Corporations, Liability for tort. Way, Public: defect. Massachusetts Tort Claims Act. Governmental Immunity. Notice, Action alleging injury caused by defect in public way. Words, "Defect."

Civil action commenced in the Superior Court Department on November 14, 1986.

Motions for summary judgment were heard by Elbert Tuttle, J., and Robert A. Mulligan, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

John F. Kehoe for the plaintiff.

Francis R. Fecteau for the town of Charlton.

Apolo J. Catala, Assistant Attorney General, for the Commonwealth.

**GREANEY, J.** The plaintiff brought this action against the defendants, the town of

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[1]The Commonwealth.

Charlton (town) and the Commonwealth, seeking to recover damages for injuries sustained by her in a one-car accident on a road in the town. Summary judgment was granted on motions filed by the defendants. Mass. R. Civ. P. 56 (b), 365 Mass. 824 (1974). The judges passing on the motions ruled that the plaintiff's claims fell within the statutes governing actions which allege injuries caused by defects in public ways, G.L. c. 81, § 18 (1988 ed.), and G.L. c. 84, § 15 (1988 ed.), and that she had failed to give the notice required as a condition precedent to maintaining such actions. Judgments entered dismissing the plaintiff's claims, and she appealed. We transferred the appeal to this court on our own motion and now affirm the judgments.

The material facts are undisputed. We summarize those facts and the procedural background of the case. At approximately 11

P.M., on November 188, 1983, the plaintiff was driving south on Route 31, Dresser Hill Road, a public way in the town. She was traveling at forty miles per hour, the posted speed limit, when she reached a sharp curve. She was unable to negotiate the curve, went off the road, and crashed into a stone wall, and then struck a tree. The plaintiff suffered severe injuries.

There had been numerous reported accidents on this stretch of Route 31 prior to the plaintiff's accident. Sometime before the accident, the county engineers had surveyed the road and made plans to widen and straighten it, but the plans had not been carried out. Two days before the accident, one of the town's selectmen wrote to the Governor, describing the dangers of the road and the many accidents which had taken place, and requested funds for reconstruction. Prior to the plaintiff's

accident, nothing had been done to correct the road's dangerous condition.

The plaintiff did not provide written notice to agents of the town or the Commonwealth within thirty days of the incident. On November 14, 1986, almost three years after her accident, the plaintiff filed a complaint in the Superior Court, under G.L. c. 258 (1988 ed.), the Massachusetts Tort Claims Act, naming the town and the Commonwealth as defendants, and alleging that negligent design, construction, and maintenance of Route 31 had caused the accident. The plaintiff's complaint asserted "numerous defects in the public way including improper grading, lighting and a road surface and line of travel inappropriate to the topography of the land at that location." In addition, she asserted that there were no visible white lines marking the edge of the road, no

guardrails, inappropriately posted and set speed limits, and no signs warning motorists of the dangers of the curve. The complaint alleged also that the defendants knew, or reasonably should have known, of the road's dangerous condition, and that the defendants had expressly and impliedly warranted to motorists that the road was safe for its intended purpose. On November 17, 1986, the plaintiff filed an amended complaint which, as far as material here, reasserted similar claims and allegations against the defendants.

After the completion of discovery, the town filed a motion for summary judgment. A judge of the Superior Court granted the town's motion on the ground that the plaintiff's exclusive remedy against the

town was provided by G.L. c. 84, § 15, [2] and that her failure to give the notice required by G.L. c. 84, § 18, [3] barred her

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[2] General Laws c. 84, § 15 (1988 ed.), provides, in relevant part, as follows:

"If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the country, city, town or person by law obliged to repair the same, he may, if such county, city, town or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city or town more than one fifth of one percent of its state valuation last preceding the commencement of the action nor more than five thousand dollars...."

[3] This statute provides, in relevant part, as follows:

"A person so injured shall, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way in repair, notice of the name and place of residence of the person injured, and the time, place and cause of said injury

action. The Commonwealth thereafter filed a similar motion for summary judgment asserting that the claims against it were barred by G.L. c. 81, § 18 (1988 ed.). This motion was granted by another judge of the Superior Court on the ground that G.L. c. 81, § 18 (1988 ed.), [4] provided the

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or damage; and if the said county, city, town or person does not pay the amount thereof, he may recover the same in an action of tort if brought within three years after the date of such injury or damage."

[4] General Laws c. 81, § 18 (1988 ed.), provides, in relevant part, as follows:

"The commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four, except that the commonwealth shall not be liable for injury sustained because of the want of a railing in or upon any state highway, or for injury sustained upon the sidewalk of a state highway or during the construction, reconstruction or repair of such highway. The amount which may be recovered for any such injury shall not exceed one-fifth of one percent of the

plaintiff's exclusive remedy against the Commonwealth, and she had failed to comply with the notice provisions of that statute.

On appeal, the plaintiff argues that G.L. c. 84, §§ 15 and 18, and G.L. c. 81, § 18, are not her exclusive remedies, because the alleged negligent design of the road is not a "defect" as that term is used in the statutes. She maintains that her complaint stated appropriate causes of action against both defendants under the Massachusetts Tort Claims Act, G.L. c. 258. [5] She also argues

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valuation of the town in which the injury was received, nor shall it exceed four thousand dollars. Notice of the injury as required by law shall be given to a member of the department [of public works]".

[5] The summary judgment motions were decided in the Superior Court on the arguments just described without regard to whether, at the time of the accident, the road was a State highway or a public road exclusively controlled by the town, a fact which neither the parties, nor the judge below, considered relevant. The appeal has been briefed on the same basis, and we decide it in the manner presented. See

that, even if G.L. c. 884, §§ 15 and 18, and G.L. c. 81, § 18, provide exclusive remedies, she was not required to give notice because agents of the defendants were aware of the dangerous condition. If these arguments are rejected, the plaintiff argues that the provisions for notice in the statutes are unconstitutional. We conclude that summary judgment was properly entered for the defendants on these issues and that other arguments made by the plaintiff need not be considered.

1. This court has consistently held that G.L. c. 84, § 15, provides the sole remedy against a municipality for personal injuries or property damage resulting from a defect or want of repair "in or upon a way." See Huff v. Holyoke, 386 Mass. 582,

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Commonwealth v. Thompson, 382 Mass. 379, 382 (1981); Kagan v. Levenson, 334 Mass. 100, 106 (1956).

585 (1982); Gallant v. Worcester, 383 Mass. 707, 711-712 (1981); Whalen v. Worcester Elec. Light Co., 307 Mass. 169, 174-174 (1940). See also Trioli v. Sudbury, 15 Mass. App. Ct. 394, 396 (1983). While this court has never expressly held that G.L. c. 81, § 18, provides the sole remedy against the Commonwealth for injuries caused by "defects" on State highways, our decisions have assumed that such is the case. See Kromhout v. Commonwealth, 398 Mass. 687, 689-692 (1986); Fearon v. Commonwealth, 394 Mass. 50, 54 (1985). When the Massachusetts Tort Claims Act was enacted in 1978, the Legislature took special care to provide that its provisions were not to be construed as superseding or repealing § 18 of G.L. c. 81, and §§ 15-25 of G.L. c. 84. See St. 1978, c. 512, § 18 ("The provisions of this act...shall not be construed to supersede or repeal section eighteen of chapter eighty-

one and sections fifteen to twenty-five, inclusive, of chapter eighty-four of the General Laws"). It is obvious that the Legislature intended that these statutes provide exclusive remedies for actions against both municipalities and the Commonwealth for injuries caused by defects in ways under their control. The language in St. 1978, c. 512, § 18, permits no other reasonable conclusion. See Caine v. Commonwealth, 368 Mass. 815, 816 (1975). We now hold that G.L. c. 81, § 18, like G.L. c. 84, § 15, is an exclusive remedy. If the plaintiff's action falls under these statutes, she has no other basis for suit.

The plaintiff maintains that the statutes do not apply because the allegedly negligent design of the road, and the negligent failure to correct its problems, do not state "defects" under these statutes, but instead constitute the basis for claims

under G.L. c. 258. She argues that the word "defect" contemplates holes, bumps, ruts, and the like, rather than negligent design problems which might render a road inherently dangerous. We disagree.

"[D]efect," as used in G.L. c. 84, has been defined as "anything in the state or condition of the way that renders it unsafe or inconvenient for ordinary travel" (emphasis added). Gallant v. Worcester, supra at 711. See Whittaker v. Brookline, 318 Mass. 19, 25 (1945); Whalen v.Worcester Elec. Light Co., supra at 174; Gregoire v. Lowell, 253 Mass. 119, 121 (1925). See also E. Martin & E.F. Hennessey, Automobile Law and Practice §§ 611-622 (1976 & Supp. 1987). General Laws c. 81, § 18, incorporates this definition of "defect" by its express reference to c. 84. As can readily be seen, this definition is broad in scope and on its face encompasses claims like those made by

the plaintiff. To avoid the obvious result that her claims come within the definition, the plaintiff refers to, and relies upon, a Nineteenth-Century decision for the proposition that negligent design of a road should not be considered a "defect" under the statutes. The court in Smith v. Wakefield, 105 Mass. 473 (1870), construing Gen. Sts. c. 44, § 22 (1860), an earlier version of G.L. c. 84, § 15, was confronted with a situation somewhat similar to the one at hand. The alleged problem was a "sudden curve in the road as it emerged from under the railroad bridge, forcing the travel inconveniently near the wall," Id. at 474. The plaintiff's team of horses was frightened by the curve, throwing the plaintiff down and running over him. The court held that the sudden curve was "an error in the location, and not a defect in the construction or maintenance of the road

for which the town is liable." Id. The plaintiff argues that this language establishes that the term "defect" does not include problems with roads attributable to their negligent design.[6]

We discern little useful precedential value in Smith. The decision has never been cited in any later Massachusetts opinion, and its rationale was based more on the allocation of powers and responsibilities between governmental agencies than upon a

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[6] This argument is bolstered in the plaintiff's eyes by the fact that, five years earlier, the court in Barber v. Roxbury, 11 Allen 318, 320 (1865), had defined "defect" under Gen. Sts. c. 44, § 22 (1860), as "[a]nything in the state or condition of the highway, which renders it unsafe or inconvenient for ordinary travel." According to the plaintiff, the Smith case excluded from the definition of "defect", set forth in the Barber case and adopted in modern cases, problems connected with negligent design of a road.

construction of the term "defect".[7] Moreover, the plaintiff's reading of Smith is contradicted by later case law, which will be discussed below. To the extent that the Smith decision may conflict with later precedent on the point, we do not follow it.

In Gallant v. Worcester, 383 Mass. 707 (1981), the plaintiff's husband was struck and killed by a motor vehicle as he walked across a public way. The plaintiff brought an action against the city alleging

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[7] The court in Smith noted that county commissioners had located and laid out the road, and by law the town was obliged only to keep the road in repair. In fact, the town had "no right to go outside the limits defined by the location, in order to make the highway more safe or convenient for travel." Smith v. Wakefield, supra at 474. The proper remedy, according to the court, was application to the county commissioners to widen or straighten the road. The plaintiff does not allege that the town or the Commonwealth had no right to alter or relocate Route 31. Indeed, the plaintiff's complaint is based on the assertion that the town and the Commonwealth had the right and the responsibility to do so.

"negligent design, construction, and maintenance" of the public way. Id. at 708. She also alleged that the city had notice of the unsafe and dangerous condition, or should have had due notice through reasonable inspection. Id. at 711. The plaintiff contended that her complaint stated a claim under G.L. c. 258, and did not fall within G.L. c. 84, §15, because negligent design, construction, and maintenance of public ways are not related to the actual state or condition of the roads. The contention was rejected, and it was held that the plaintiff's complaint, to the extent that she alleged injury resulting from the accident, stated a cause of action that fell within G.L. c. 84, §15, and was properly dismissed because the plaintiff had failed to comply with the notice requirements under §18. Id. at 712. Similarly, the Appeals Court has held that

a complaint alleging that an accident was caused by a town's failure to erect a stop sign at an intersection stated a claim which fell within G.L. c. 84, §15, which provides the exclusive remedy for injuries sustained as a result of a defect in a public way, and, as a result, the plaintiff could not seek recovery under G.L. c. 258, on the theory of negligence. Trioli v. Sudbury, 15 Mass. App. Ct. 394, 396-397 (1983). In a recent case, this court has assumed that allegations of negligent design, construction, and maintenance of roads state claims of "defects" under G.L. c. 81, §18, the statute allowing recovery for injuries caused by defects in State highways. See Kromhout v. Commonwealth, 398 Mass. 687, 689-691 (1986).

We perceive little appreciable distinction between the cases just discussed

and the present case. [8] An allegation of failure to correct an allegedly negligently designed road asserts the existence of a "defect" under the public way statutes because the road's layout is an aspect of its state or condition that renders it unsafe or inconvenient for ordinary travel. The word "defect" thus includes not only physical impairments to the road itself

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[8] In her brief the plaintiff attempts to distinguish her case by arguing that her claim is based only on negligent design of the road and on the negligent failure to correct it. The plaintiff's complaint, however, alleges, "Route 31. . . was and has been negligently designed, constructed and maintained." This is identical to the wording used by the court to describe the complaint in the Gallant case. See Gallant v. Worcester, supra at 708. She also alleges defects, such as improper grading, an inappropriate road surface, and lack of proper lighting, white lines, guardrail, speed limit signs, and warning signs, all of which are clearly "defects" under G.L. c. 81 and c. 84.

which can cause immediate danger to a traveler, but also possible conceptual problems with the road's design which may require extra caution by those using it. The exclusive remedy for any of these problems falls under G.L. c. 84, §15, and G.L. c. 81, §18, and a plaintiff may not escape the requirements of these statutes by framing a complaint in terms of negligence principles which seek to invoke the provisions of G.L. c. 258. See Gallant v. Worcester, supra at 709; Trioli v. Sudbury, supra at 397. The plaintiff in this case is barred from recovery because she failed to comply with the written notice requirement under the statutes. See G.L. c. 81, §18; G.L. c. 84, §18; Gallant v. Worcester, supra; Trioli v. Sudbury, supra at 397-398.

We reject the plaintiff's alternate argument that it was unnecessary for her to comply with the written notice requirements

because the defendants were aware of the dangerous condition of the road. An unequivocal requirements under both statutes to the maintenance of any action is that the town or the Commonwealth "had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair." G.L. c. 84, §15. This requirement coexists with the requirement that written notice of an injury be given to the town or commonwealth within thirty days of an accident. G.L. c. 84, §§18 and 19; G.L. c. 81, §18. Thus, in addition to actual or constructive notice of the dangerous state of the road, timely written notice of the injury is a clear condition precedent to the existence of a cause of action, and no other form of notice may be substituted. See Paddock v. Brookline, 347 Mass. 230, 231-232 (1964); Mooney v. Salem, 130 Mass. 402, 403 (1881).

2. We also reject the plaintiff's arguments pertaining to the constitutionality of the notice provisions.

a. The plaintiff first contends that the notice requirement violates equal protection of the laws, as guaranteed by the United States and Massachusetts Constitutions, because it divides tortfeasors into two classes -- private tortfeasors to whom no notice need be provided, and governmental tortfeasors to whom notice must be given. General Laws c. 84, §15, does not create such a distinction. Both private parties and governmental entities are entitled to notice within thirty days when a defect in a way under their control is alleged under G.L. c. 84, §15. See Murphy v. Boston & Me. R.R., 332 Mass. 123 (1954); Dobbins v. West End St. Ry., 168 Mass. 556 (1897). Likewise, because G.L. c. 81, §18,

applies only to State highways, it creates no distinction. The only real differentiation established by the statutes is between plaintiffs who allege injuries resulting from a defect in a public way and all other plaintiffs. Such a classification obviously is not a violation of equal protection principles. See Hearn v. Massachusetts Bay Transp. Auth., 389 Mass. 404, 406 (1983); Paro v. Longwood Hosp., 373 Mass. 645, 651 )1977).

b. Nor does the notice requirement deprive the plaintiff of property without due process of law as guaranteed by the Federal and State Constitutions. Before the statutes were enacted, all claims against government entities for injuries caused by defects in public ways were barred by the doctrine of sovereign immunity. When the Legislature waived this immunity, by enacting statutes allowing recovery for

defects in public ways, and allowed the Commonwealth and its political subdivisions to be sued in certain instances in the courts of the Commonwealth, it established limitations and conditions on that waiver. See Morris v. Massachusetts Maritime Academy, ante 179 (1991) (admiralty claims); Broadhurst v. Director of the Div. of Employment Sec., 373 Mass. 720, 722 (1977) (costs). See also Smith v. Commonwealth, 347 Mass. 453, 455-456 (1964); Whalen v. Worcester Elec. Light Co., 307 Mass. 169, 174 (1940).

The thirty-day notice requirement was one such limitation. It is rationally related to a permissible legislative objective. Klein v. Catalano, 386 Mass. 701, 712 (1982). The Legislature could have decided that the notice requirement is necessary to safeguard public defendants against frivolous claims and excessive

liability, see Trioli v. Sudbury, supra at 3965, by allowing such defendants to investigate and remedy any defects expeditiously, see Caterbury v. Boston, 141 Mass. 215, 218 (1995), and by allowing them to evaluate claims and to determine at an early stage whether liability could be imposed against them. See Murphy v. Boston & ME. R.R., supra at 123-124.[9]

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[9] The plaintiff argues that the design problems with the road were the result of "gross negligence," which takes her claims outside G.L. c. 84, §15, and G.L. c. 81, §18. The language of the statutes appears to allow for no such exception once it is determined that a plaintiff has incurred damage as the result of a "defect" in the road. In any event, this argument was not precisely raised below and has not been adequately argued on appeal, so we need not deal with it. See Century Fire & Marine Ins. Corp. v. Bank of New England-Bristol County, N.A., 405 Mass. 420, 421 n.2 (1989); Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374, 376 n.2 (1985).

The plaintiff also contends that the $5,000 liability limit of G.L. c. 84, §15, and the $4,000 liability limit of G.L. c. 81, §18, violate equal protection and due

Summary judgment was properly granted for the defendants.

Judgments affirmed.

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process guarantees. Summary judgment was properly granted on the issue of liability; the issue of damages is not before us.

Appendix B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 86917

MARY T. RAM,
Plaintiff

vs.

COMMONWEALTH OF MASSCHUSETTS,
DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WORKS, and
TOWN OF CHARLTON,
Defendants

MEMORANDUM OF DECISION AND ORDER
ON THE DEFENDANT TOWN OF CHARLTON'S
MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the defendant Town of Charlton's ("The Town") motion for summary judgment. The plaintiff's complaint alleges a cause of action under G.L. c. 258 for injuries sustained by the plaintiff when "the automobile [she] was operating left the road and struck a large tree." Further, the

complaint alleges negligent design, construction, and maintenance of Route 31 in the Town of Charlton.

The Town moves for summary judgment on the grounds that the pleadings make out a cause of action for injury from a defect in a public way under G.L. c. 84, § 15 and not under G.L. c. 285. At oral argument for this motion, the plaintiff conceded that, if the complaint alleges a cause of action under G.L. c. 84, then proper [p. 2] notice was not given as required by Section 18 of Chapter 84.

G.L. c. 84 § 15, provides in pertinent part: "If a person sustains bodily injury or damage in his property by reason of a <u>defect</u> or a want of repair . . . <u>in or upon a way</u> . . . he may . . . recover damages therefor from such county, city, town or person . . ." A defect, for purpose of § 15, is "anything in the state or condition of the

way that renders it unsafe or inconvenient for ordinary travel." Trioli v. Town of Sudbury, 15 Mass. App. Ct. 1394, 397 (1983) quoting Gallant v. City of Worcester, 383 Mass. 707, 711 (1981). Chapter 84 provides an exclusive remedy against the municipality and the Massachusetts Tort Claims Act, G.L. c. 258preserved the exclusivity of that rmedy. Trioli, supra at 396.

The court finds that the allegations in the plaintiff's complaint constitute, in substance, a claim for injuries under G.L. c. 84, § 15 and not under G.L. c. 258. As noted above, the plaintiff failed to comply with the presentment requirements of G.L. c. 84, § 18. The giving of such notice is a condition precedent to the maintenance of a personal injury action against the Town and is also an essential ingrediant indispensable to the existence of the cause of action. Paddock v. Town of Brookline,

347 Mass. 230, 232 (1964). The defendant, the Town of Charlton, is entitled to judgment as a matter of law. [P. 3]

ORDER

It is therefore ORDERED that the defendant, the Town of Charlton's motion for summary judgment be GRANTED.

Elbert Tuttle
Justice of the
Superior Court

Dated: November 22, 1988

Appendix C

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
Room 1412 Court House
Boston, Massachusetts 02108
(617) 725-8055

March 27, 1991

John F. Kehoe, Esquire
KEHOE AND GRADY
133 Federal Street
Boston, MA 02110

Dear Attorney Kehoe:

RE: SJC-5484
MARY T. RAM
vs.
TOWN OF CHARLTON & another

Your Petition for Rehearing of the above-captioned appeal has been considered by the Court and is denied.

Very truly yours,

L. Holliey White
Assistant Clerk, pro tem

cc: Edward P. Healy, Esquire
Francis R. Fecteau, Esquire
HEALY & ROCHELEAY, P.C.
484 Main Street, Suite 560
Worcester, MA 01608

Apolo J. Catala, A.A.G.
Torts Division
131 Tremont Street
Boston, MA 02111

Appendix D(a)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS
COURT OF APPEALS
CIVIL ACTION NO. 89-P-886

MARY T. RAM,

Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF PUBLIC WORKS, AND TOWN OF CHARLTON,

Defendants

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE MASSACHUSETTS SUPREME JUDICIAL COURT

Judge Liacos: I understand Mr. Kehoe, that you are going first and Mr. Catala and Mr. Fecteau are going to split the 15 minutes evenly, all right?

Judge Liacos: All right Mr. Kehoe, to get you off on the right or the wrong foot, I think I was the author of Gallant v.

Worcester.

Mr. Kehoe: Yes Judge.

Judge Liacos: And your allegations herein seem to be founded on negligent design of the highway rather than negligent design, construction and maintenance which we dealt with in Gallant, but in my mind it raises a significant problem for you.

Mr. Kehoe: Your Honor, in reply let me pose a hypothetical. Let us say there is a defect in a road, to wit, a bridge falls in. In other words there is a major defect.

Judge Liacos: That would be a defect, we all agree with that. Mr. Kehoe: A police officer is sent out there to that bridge as alerted by a member of the Public and he stays there in conditions like those ads one sees on television when you hope your battery works. It is pouring, it is raining, it's terrible. It's a very small town. This officer is there guarding this

bridge, he waits there and does his duty as best he can for a long period of time, but at a certain point he is expecting relief to come, and the relief does not come either because the town can't afford the relief due to Prop. 2 1/2 or for some other reason. The officer then says, "I've had enough of this" and he leaves. I think that that is a violation of the Massachusetts Tort Claims Act when he leaves like that and I think that that is analogous to the Town failing to follow up on the letter of November 16, 1983 which is attached to my brief as a part of the record (R-128). That letter from a member of the Board of Selectman sent to Governor Dukakis states in great detail that the Town and the powers that be that run the Town, to wit, the Board of Selectman know exactly what is wrong with the road which is that the road itself is wrong and that they have been working on this problem for 5

years and that they know how to fix it. They have to do a taking. They have had trouble because certain members of the town object to a taking of a portion of the road. They know the very very great likelihood that harm will ensue if they don't straighten this road out. They talk about the 41 accidents they have seen in the preceding 3 years. They set forth with great detail that they know exactly what the problem is and how it ought to be fixed going back in time as I cited in my brief. Not to concede that my case is exactly like the bridge that fell in but in any event, even if it is a defect in a road, like the Gallant case and it looks like design is a defect, you cannot know what the problem is and set out exactly what has to be done and then just sort of drop it. I mean, this is exactly, what happened here.

Judge Liacos: Isn't the point of it, Mr.

Kehoe, that the legislature for better or worse has said no, uh, we are not dropping it but you have to give proper notice to the town and you're limited to $5,000.00.

Mr. Kehoe: Therein, lies the rub, Judge.

Judge Liacos: Of course, therein lies the rub. The legislature said that we know we are sloppy all over the Commonwealth, and cities and towns are sloppy and we are not going to waive sovereign immunity on defect cases except on these procedures.

Mr. Kehoe: I do not think it solves my fallen in bridge situation. I think if you ...

Judge Liacos: It doesn't solve anything because we are going to decide it.

Mr. Kehoe: Exactly.

Judge Liacos: But it is clear, is it not, that if it falls, if this situation, if a road curving through the woods let's say that your plaintiff drives off of it, hits

a tree like so many others, perhaps, if that is a defect then you're off...

Mr. Kehoe: Well, none of the cases...

Judge Liacos: Or the plaintiff is off.

Mr. Kehoe: Smith v. Wakefield, which is a very old case granted, is a case in point as hoary as it may be. Now, troublesome as the case of Tivoli v. Sudbury, is I do not know if that was addressed in that case. I come back to my hypothetical. I mean, in Tivoli v. Sudbury there was a stop sign and the stop sign's highly specific, what is wrong. The Court of Appeals, which is certainly not binding on this court, of course, may have figured that was like the stop sign was up and it fell down, I mean, it is highly specific what is wrong. Whether it was briefed and addressed by the court or considered by the court is not treated in the opinion. This question that I have about the police officer who, whether he has

to go to the bathroom, or for whatever reason, leaves, I think that is what we have here, I do not think it comes within Section 84. I think that's a "Red Herring." I think this is classic kind of public official negligence as is considered and mandated to be liberally construed under the provisions of chapter 258, Ok?. I do not think he can know about the problem and then just not follow it up.

Judge Liacos: Wait, in this case is there any, under 258, any claim that the proper presentment was not made?

Mr. Kehoe: No, all set.

Judge Liacos: It is a viable alternative if you prevail on the analysis of whether it is or is not a defect. Or is it?

Mr. Kehoe: Well, I do not think I have to prevail on that, as I just said, I think that that police officer can't be derelict in his duty and walk off the job.

Judge Liacos: I know, but that is a hypothetical case, I'm talking about this case.

Mr. Kehoe: It may be is hypothetical but I think it is totally analogous to this case.

Judge Liacos: Let me just rephrase the question, if the court should conclude that this is not a defect case under ch. 84 and that it is a ch. 258 case that should go forward, is there proper presentment of record on this case?

Mr. Kehoe: Yes there is...

Judge Liacos: So we are not talking about...

You did not send a written notice.

Mr. Kehoe: Oh, yes I did Judge.

It has not been raised. I sent a written notice as required under 258 I mean, it is not filed on the record because it has never been raised.

Judge Liacos: Oh, you're talking about 81

and 84.

Mr. Kehoe: Yes, yes Judge.

Judge Liacos: There was no notice under 81 and 84.

Mr. Kehoe:Correct, your Honor.

Judge Liacos: That is all that the Judges ruled on and that's all that's before us that it is an 84 type case, a defect case and the Plaintiff did not give notice properly either to the town or the Commonwealth and that is what you're appealing.

Mr. Kehoe: And I am saying it is not an 84 case at all.

Your question about Gallant and my hypothetical go right to the heart of the matter.

Judge Liacos: Unless you can persuade us that this is not a defect then its all over for you.

Mr. Kehoe: It is all over. I do not concede

that it is a defect even though my hypo stated in the strongest possible terms assumes a defect. In my hypo, I am saying that once you started down the road to correct the problem you can't just walk away from it. It is analogous to so many things in the law. Like, you know, a good samaritan just picking up somebody and saying I do not like the lip you're giving me and putting him back on the road, you cannot do that, once they saw the problem, they focused on it. That letter talks in terms of how school buses can't use this road, how much more danger, and presumably the people that drive the school buses are familiar with the road, and still the Selectman in his letter to Governor Dukakis talked about what a terrible road it is, and why? It is located in the wrong place as in Smith v. Wakefield. How much more danger is there to strangers to the road such as the

injured plaintiff.

Judge Greaney: What is the problem with it, a sharp curve?

Mr. Kehoe: Basically the problem with the road is that it is deceptive. I've been out to see it, your honor, and its deceptive in that the curve becomes no longer a curve, in a fashion that you cannot possibly anticipate.

Judge Greaney: A warning sign?

Mr. Kehoe: Nothing.

Judge Greaney: No warning sign? If there was one it wouldn't help?

Mr. Kehoe: It would help, if there was one, but in the face of the case law that talks about signs, what I am saying is that once you know that this road is all fouled up and I am saying it is the location of the road. Somebody has been quoted as saying "that killer road", you know what it looks like? It looks like a road."

udge Liacos: Mr. Kehoe, when was the road
onstructed in its present condition?
r. Kehoe: In the 30's.
o is it clear for me to ask you this
uestion that if there was negligence in
esign it was negligence in the 1930s and
hat the condition of the road today is a
atter of negligent maintenance?
ell, I am familiar with the maintenance
ases, Judge.
udge Liacos: You are getting close to the
ine on this question right?
r. Kehoe: Of course. My main thrust...
udge Liacos: If it was negligent in design
t is not in the case as I understand it.
hat is all you stand on. I suppose you
ve a statute of limitations problems or a
tatute of repose problem.
suppose you do Judge, but my thrust is as
stated it that this is a case like the
lice officer who undertakes to do the best

n, and certainly am not being critical
lectman Haebler, I mean he was trying
the right thing, he just stopped. I
t know whether was because there was no
ng or whatever. The whole story will
out in evidence when it is determined
ere was indeed negligence under 258.

Liacos: Suppose this this is a 258
If the case is allowed to go forward
you going to propound an expert
mony?

ehoe: Yes Judge.

Liacos: You will. Have you retained
pert?

ehoe: Not at this point Judge but I...

Liacos: Are you going to get an
to say the road was not properly
ed?

ehoe: Of course, your Honor.

Liacos: An engineer, or whoever does
things?

ehoe: Yes, Judge that is what I am
ng on. The letter if read with care
that they know just how to straighten
. It is a matter of a taking, doing
ng, moving the location of the road,
is nothing really wrong with the
, it is in the wrong place and a road
oad. Well, we've kind of gone to the
of the matter, Judge. There is a
r, if I may touch on a couple of more
because I think you very capably put
nt on the spot as to what the problem
I hope I have addressed it. I mean,
aying you cannot, it is just not an 84
One could come up with other similar
If this is not what is meant under
en indeed what could be meant? A
pon and understanding exactly what is
and a negligent failure to act
riately. There is a certainty of
ge as to what the consequences will



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Judge I
Mr. Keh
will be
the cas
the pro

n under the various public duty
re, chiefly, Irwin v. Ware. This
tain. They are citing statistics
tter. I mean this drunken driver
might just have successfully
is way home. In this case they
in effect by implication in that
ou do not fix this road another
re going to be injured and I have
e one car accidents so forth and
s is a complete understanding by
thority analogous to what would
case of hazardous waste or
se as to what the problem is, how
fixed and then it just sort of
think that's a 258 case.

s: Thank you Mr. Kehoe.

Just one or two other things I
ef because that is the heart of
here is also the injunctions of
ns of chapter 90 section 33B as

own hazardous traffic locations upon
Commonwealth to learn about such
ons which, of course, they were put
notice about by this letter, and that
gain makes it a 258 case. I mean, as
e Commonwealth the reason for the
nce of that Chapter 90 Section 33B is
e as you pointed out to me, Judge, it
wn that there are roads out there that
ngerous and this statute was enacted
e sole purpose of taking steps to see
he public is not injured by those
It is a special thing about a known
hazardous location, this fits that to
The Commonwealth should have acted
t and the town should make sure that
old the Commonwealth about their duty
90 Section 33B.
nd thing that makes it a 258 case.
ligence also was allowing the road to
d. I mean, it is like the police



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If
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encom
holdi
know
that
quit
to sa
Thank
most
Mr. Fe
Yes y
Charlt
action

Well, they have to put a cruiser
or whatever, they have to stop
being used since they have the
iled kind of knowledge of what
presents.

dressed briefly the Trioli case,
.

ands for the proposition that
g later negligence by the town is
d and excused by 84 then the
Trioli is just wrong. I do not
was addressed in Trioli. Obeying
important of legal injunctions to
you're ahead, that's all I have

very much Mr. Kehoe you have been
nt with me, at least.

u.

Honor, I represent the town of
We urge the Court to affirm the
the lower Court and its grant of

or summary judgment, and again
the heart of the matter we
the two cases raised in the
my brother, Gallant and Trioli,
on point and the result is all
le, and just as your Honor is
miliar with Gallant v. the City
so am I because Regis Gallant
e on his way to meet me when I
ant District Attorney when he
incoln Square just across from
e and he was killed by a motor
hat case they did not get into
the design theory but clearly
n defect case and the Court...

There were some, at least in
allegations and fact patterns
e some differences in Gallant
o this fact pattern. If I
we wrote and I frankly I



haven't lo
today, but
a claim
maintenance
the defect.
saying, or
repose probl
down the roa
is that the
period, and
claim that c
I think that
hurdle, other
Mr. Fecteau:
I do not thin
the Smith v.
either. Back
ways you coul
Commonwealth.
trying the
chapter 84 bec

at it in preparation for
ve said was that there was
of negligent design,
construction and that was
hear your brother, he is
y run into a statute of
f he prevails, but that is
he is saying that my claim
was negligently designed,
heory that is a tort-type
fall under 258. He agrees
s to get over that Gallant
you know, he's sort of...
o not think he can do it.
t he takes much help from
field case that he cited
1870 there were not many
e the government in this
intiffs in those days were
efforts to get within
if they did not they were

was out in that case
that the location of
n of Wakefield had
That there was the
and I do not know
ink that Route 31 is
as laid out by the

oing to ask that it
riginally a county

ght, and Route 31 is
the Commonwealth of
a number of...
tely you are right.
s situation is not
ff or any other
selves in the same
ts, and let's talk
start talking about
is a plaintiff who

did not come out
the road at a cur
interrogatories
curve at 40 mile
suggests operato
through the analys
laid out in his
accidents on dry
preceding this a
stretch, not limi
curve but a 2 mile
roughly 15 single
in 3 years, that i
demographic expert
numbers mean in a
police officer know
an accident that wa
error and an accid
design defect, or a
Judge Liacos: This
but your brother

urve. She ran off
her own answers to
d she entered the
our. That to me
r and if you go
rother so carefully
about single car
es in the 3 years
t, in a 2 miles
o this particular
h, 3 years before,
surface accidents
year. I am not a
o not what these
, but how does the
istinguish between
sed by an operator
nich is caused by
d of a defect.
not be meaningful,
that there is no

warning on the curve or anything no sign, do you agree with that, as to what is in the record.

Mr. Fecteau: That will be my understanding, too, and if he takes some solace in the fact there is no signs I think it puts him squarely in Trioli because it is not just a question of an absent stop sign. Trioli was a case with a plaintiff in that case was trying to make a 258 claim and the court said that is not a 258 case, that is an 84 case, and there was a known situation for at least 10 years that the Town in Trioli v. the Town of Sudbury made a finding that a stop sign was needed 10 years before the actual accident that gave rise to that litigation. That is more than an absent stop sign. That is a dangerous intersection as well so I think that just to limit it to an absent stop sign that may have been knocked down, that is not the case. It was

never put up, according to the facts of the case, and I suggest that the plaintiff does not get any help at all from even his own best cited case, Smith v. Wakefield. He addresses a constructive notice issue in his brief I will like to touch on, and again he talks about the town, the letter of the Commonwealth saying he needs some help here fix this road, it is dangerous, look at all these accidents, I suggest we get into the analysis of the governmental action to achieve a public good as opposed to a private litigant taking advantage; such as was done or attempted to be done in the Ribiero v. Town of Granby cases, the health inspector, Trioli, Appleton v. The Town of Hudson, in all of these cases there was evidence of pre existing knowledge of a danger but the Court in all those cases said, well we have to distinguish between the government's efforts and purpose to

achieve a public good as opposed to a duty to a private person, and Irwin v. Ware is just not helpful to this case because there was so special circumstances in that particular case.

Judge Liacos: As the cases came to us, Mr. Fecteau, we do not have to get to that kind of analysis at this point.

Mr. Fecteau: If the court finds that chapter 84 applies, there is no written notice, plaintiff's out.

Judge Liacos: What if we conclude the opposite, are the cases of Irwin, Dinsky, A.L. and so on, are they something that we have to address if we say it is a 258 case? At this stage?

Mr. Fecteau: As a 258 case, no, but there is a problem and this will give rise to summary judgment # 2 and that is a discretionary function which is addressed in Drivers and Sanker v. Town of Orleans, so I

do not think that the plaintiff has much place to go here.

Judge Liacos: Thank you Mr. Fecteau.

Mr. Catala.

Mr. Catala: May it pleas the Court, my name is Apolo Catala and I represent the Commonwealth in this case.

Judge Liacos: I hope, and I don't mean to cut you off but if you are not going to add anything new then I will take it on the brief, but go ahead.

Mr. Catala: Well, if the Court has pre-emptied me and has perhaps read my mind I do not intend to add much. I just want to point to page 40 in the record where it is clear that the plaintiffs case is not based on just a negligent defect claim but is also includes claims that the road had holes and had...

Judge Liacos: You are referring to the plaintiffs complaint. I take it or to ...?

Catala: Actually to the interrogatories
h were before both J. Tuttle and J.
igan and I will say that whatever appeal
aim that negligent design theory has, we
ot have to get to it under these facts,
e facts are uncontroverted and they
d and it would seem to me that there is
ay out of chapter 80, 84 and chapter 81.
e Liacos: That is on chapter 40 Mr.
la?

Catala: Yes it is on page 40 and I hope
there are also and it is another
rence on page 63 and for a better
rence on page 57 of the record your
r, and I will be pleased to entertain
other questions, and there is also one
comment that I will make as that if I
l take a definition of the defect as
ing in the state or condition of the
hat makes it inconvenient for ordinary
l it would seem to me that a negligent

claim will be encompassed in that
ion and certainly that's my reading
ant.

iacos: If this were a pure negligent
claim, putting aside any other kind
lems, is it your position or that is
s a defect kind of point?

ala: Yes if we are going to be true
definition I would say, yeah, a
defect makes it inconvenient for
y travel that that will have to fall
the definition.

iacos: Thank you.

ala: Your welcome.

oe: Honor, may I say one thing?

acos: It is not our custom to allow
. Mr. Kehoe why don't you send us
tter and a copy to your brothers,
days, alright?

e: Right Judge.

2/6/90

dix D(b)(1)

LAW OFFICES OF
JOHN F. KEHOE
133 FEDERAL STREET
Boston, Massachusetts 02110
617 542-0200
FAX 617 426-2805

ber 7, 1990

ces of the Supreme Judicial Court
nwealth of Massachusetts
ourt House
rton Square
, MA 02108

emen:

ping with the indulgence granted me by
Liacos at the close of oral argument
above entitled case yesterday please
er the following:

though the focus of the questioning by
Liacos was whether negligent "design
uction and maintenance" which were
o be "defects" under Chapter 84, in
se of Gallant v. Worcester makes that
determinative of the case at bar, I
he position on behalf of the plaintiff
his was a case ruled by the provisions
pter 258 because of the letter from
wn of Charlton to the Commonwealth and
wn and the Commonwealth's failure to
w through".

time however did I concede that this
negligent design case. In fact I

ally rely on the holding of Smith v. Wakefield on our facts, that the f damage is not a defect but the of the road or portions of the the road in question was relocated there was no longer a curve in it an redesigned with a new redesigned eople would speak about the road in owing manner "the road used to be over there", they would not say the redesigned. If this is a semantic ce I think [it] is an important difference that should be ed by the Court keeping in mind the Smith v. Wakefield which although ood law. This is reenforced by the the letter of the Town speaks of g portions of the road and the ies with Town people who did not ose part of Charlton common. It is e road is rather than what it is he source of danger.

lly submitted
am
torney

ehoe

D(b)(2)

TOWN OF CHARLTON
CHARLTON, MASS 01507

BOARD OF SELECTMEN
November 16, 1983

Michael S. Dukakis
use
MA 02133

ernor:

October 25, 1983, I was in your
with State Representative Marilyn
i and I spoke to you about obtaining
r a road in Charlton. You asked me
it up and give it to Representative
i and she in turn could deliver it

February 19, 1980, the Charlton
Selectmen submitted a letter to Mr.
imes, District Highway Engineer, in
rict #3 Office, 403 Belmont Street,
r, requesting the reconstruction of
(also known as Dresser Hill Road or
oad) in Charlton, under the Federal
ondary Roads program.

original request was from Route 20
dley Town Line, but due to problems
ing the townspeople to give
on to take a small part of the
Common, we changed our request, and
ccepted, to start at Muggett Hill
the Dudley Line for a distance of
eight tenths miles. We have been



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Th
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th Peter Donahue, State Engineer
Worcester Office.

oad is a State numbered road and
traveled with people going to
Connecticut. The road is used
rt 1,387 pupils to and from
lton Regional School District,
510 pupils to the Southern
County Vocational School daily.
also a lot of students who use
to get to school. This road is
dents going to Nichols College in
e road is a narrow and curvy road
embankments on one side and very
n the winter months.

olice records show that in the
years, there have been over
ccidents on this road. Some of
ery serious and there have been
ties. We feel safety is
priority.

wn of Charlton is a large town
The Town covers an area of forty-
e miles (the third largest in the
e have seventy-eight miles of
and fifty miles of camp roads to
f.

chael S. Dukakis
1983

nies we are asking for are from
and State Gasoline Tax. The
that the people of Charlton and
that use this road have, over
put a lot of money into this
iggest concern is the safety of

d all the people that use

eliminary survey work has
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eonard Haelber, Member
harlton Board of Selectmen



Appendix D(c)

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On Appeal Fr
Superior Court

Brief for
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EDWARD P.
FRANCIS R.
HEALY & RO
484 Main S
Worcester,

H OF MASSACHUSETTS

EALS COURT.

89-P-886.

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Y T. RAM,
ff-Appellant,

v.

OF CHARLTON,
H OF MASSACHUSETTS
TRANSPORTATION, and
H OF MASSACHUSETTS
OF PUBLIC WORKS,
nts-Appellees.

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n Order Of The Suffolk

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Defendant-Appellee,
f Charlton.

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URITTEN NOTICE
G.L. CH. 84 IS
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Co., Inc., 388 Mass.
, 67 (1983); Klein v.
01, 706, 437 N.E.2d
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Oil Co. v. City of
684, 421 N.E.2d 1181,
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N.E.2d 471, 474
386 Mass. at 707,
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N.E.2d at 519; Pa
373 Mass. 645, 6
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383 Mass. at 688.
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E.2d at 523.
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446 N.E.2d at 67;
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N.E.2d 985, 988
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v. City of Revere,
.2d at 1185.
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conceivable grounds exist to justify the Legislature's action. Paro v. Longwood Hospital, 373 Mass. at 650-651, 369 N.E.2d at 988. If any state of facts could exist which would justify the legislation, it must be presumed to have existed when the legislation was passed. Pinnick v. Cleary, 360 Mass. 1, 14, 271 n.E.2d 592, 601 (1971). [P.22]

Plaintiff Mary Ram argues that the notice provision of M.G.L. Ch. 84, §18 deprives her of a property right without due process of law because it deprives her of the right to recover against the Town of Charlton for its alleged negligence in the design, construction, grading, and lighting of Route 31, Dresser Hill Road. It must be borne in mind that before the passage of the statutes preceding M.G.L. Ch. 84, all claims against municipalities were barred by sovereign immunity. The Legislature chose

to give travelers injured by defects on ways a remedy. It was consequently free to structure the parameters of that remedy to limit the municipality's exposure by imposing conditions precedent on the traveler's right to recover. Whalen v. Worcester Electric Light Co.. 307 Mass. at 174-175, 29 N.E.2d at 767. As long as the Legislation bears a rational relation to a legitimate state purpose, the Legislature is free to abolish causes of action which it created or which existed at common law. Klein v. Catalano, 386 Mass. at 712, 437 N.E.2d at 519. In addition, "the personal, substantive right of a tort victim to recover damages," is not a fundamental right or interest under the federal or state constitutions. English v. New England Medical Center, 405 Mass. 423, 428, 541 N.E.2d 329, 332 91989); Hallett v. Town of Wrentham, 398 Mass. 550, 557, 499 N.E.2d

1189, 1193 (1986). [P.23]

The thirty day written notice provision of M.G.L. Ch. 84, §18 is rationally related to several legitimate state objectives. "Limiting the duration of liability is a well recognized public purpose." Klein v. Catalano, 386 Mass. at 709, 437 N.E.2d at 520. As the Supreme Judicial Court wrote in Klein, upholding the constitutionality of M.G.L. Ch. 260, §2B, the Statute of Repose: "There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'where evidence has been lost, memories have faded, and witnesses have disappeared.'" Id., 437 N.E.2d at 520. In addition to providing a remedy for travelers injured by defects in ways, M.G.L. Ch. 84, §15 also imposes an obligation on the

municipality to keep its ways in repair. To do so, it must have prompt notice of the defect, both to evaluate the necessity and cost of repair, and to prevent others from being injured. The thirty day written notice provision serves these objectives. Also, the city or town has a duty to its residents to manage its funds wisely and to conserve municipal finances. The thirty day written notice provision allows the city or town to set aside funds for the payment of meritorious claims and to be able to budget for future claims. It further protects the Town against claims which may prove to be fraudulent but are nonetheless litigated to the full extent. Cf. [P.24] Lodge v. District Attorney for Suffolk County, 21 Mass. App. 277, 486 N.E.2d 764, 768 (1985), rev. den. 396 Mass. 1106, 488 N.E.2d 1179 (1986). (Purposes of presentment requirement of Tort Claims Act).

Plaintiff also challenges M.G.L. Ch. 4, §18 on equal protection grounds. Classification is an essential part of the legislative task." Paro v. Longwood Hospital, 373 Mass. at 649, 369 N.E.2d at 38. As long as the legislation dos not burden a fundamental right or adversely affect a suspect class, the legislation will be upheld if it rationally furthers a legitimate state interest. Klein v. Catalano, 386 Mass. at 715, 717, 437 N.E.2d 525; Hallett v. Town Wrentham, 398 Mass. 557, 499 N.E.2d at 1193. The Equal Protection Clause of the Fourteenth Amendment only prohibits classifications which are arbitrary or irrational or which impose invidious discrimination. Pinnick v. Cleary, 360 Mass. at 28, 271 N.E.2d at 609; Paro V. Longwood Hospital, 373 Mass. at 649, 369 N.E.2d at 998. Discrimination between plaintiffs and defendants is not per se

constitutional. Id. at 649, 369 N.E.2d at
. Nor do distinctions between classes of
aintiffs necessarily violate the Equal
otection Clause. See Grass v. Catamount
velopment Corporation, 390 Mass. 551, 553-
, 457 N.E.2d 627, 629 (1983) (legislative
ision to distinguish between death claims
non-death claims from [P.25] injuries at
resort); Hearn v. Massachusetts Bay
nsportation Authority, 389 Mass. 404,
, 450 N.E.2d 602, 604 (1983) (distinction
ween plaintiff struck by MBTA bus and
intiff struck by other vehicle does not
late Equal protection Clause); Paro v.
gwood Hospital, 373 Mass. at 651, 369
.2d at 986 (distinction between medical
practice plaintiffs and other tort
intiffs does not violate Equal Protection
use).

The Legislature could have logically
cluded that plaintiffs injured by a

n a way should be treated
y than those injured by other
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.classes." Shell Oil Co. v. City
383 Mass. at 691, 421 N.E.2d at
rther, it could have rationally
that the legitimate public purpose
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dical Center, 405 Mass. at 429,
at 533. It is always unfortunate
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Corp., 390 Mass. at 553, 457
29; [P.26] Gallant v. City of
383 Mass. at 714, 421 N.E.2d at
courts have carved out an
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rought under M.G.L. Ch.258, §2,
under M.G.L. Ch. 85, §15.
84, §15 is expressly limited by
to claims for property damage
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frequently and "to constitute a
drain on the governmental
Gallant v. City of Worcester,
714, 421 N.E.2d at 1201; Grass
Development Corp., 390 Mass. at
E.2d at 629. Death claims, on
nd, are "drastic in the extreme
ly infrequent." Therefore, they
e constrained to the recovery
L. c. 84." Id. Once the claim
of the ambit of ch. 84, §15,

ute's definition of "defect" is no
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. 999, 513 N.E.2d 696 and Gallant
f Worcester, 383 Mass. 707, 421
96, cited by the plaintiff for the
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not a defect under M.G.L. Ch. 84,
napposite to the case at bar.
courts in other jurisdictions have
wn statues providing for short
er various circumstances [pg.26]
erminative. Our Supreme Judicial
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ort Statutes of Limitations or
limit the liability [P.27] of a
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e Court held that the statute did
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atalano, 386 Mass. 707, 715, 437
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ectric Co., 399 Mass. 687, 693,
509, 513 (1987) cert. den. 108 S.
1987. Similarly, a two year
Limitations for death, personal
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ts Bay Transportation Authority,
161A, §21, was also held to be
nal. Hearn v. Massachusetts Bay
ion Authority, 389 Mass. at 407,
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Court may not sit as a
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386 Mass. at 717, 437
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Petitioner/A
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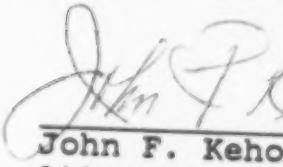

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Supreme Court, U.S.
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No. 90-1948

# In the Supreme Court of the United States.

October Term, 1990

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MARY T. RAM
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WORKS,
TOWN OF CHARLTON
Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE
SURPREME JUDICIAL COURT
OF MASSACHUSETTS

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## STATE RESPONDENTS' BRIEF IN OPPOSITION

Scott Harshbarger
Attorney General
of Massachusetts

David Hofstetter
Judith Fabricant*
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether a Masschusetts statute hich waives sovereign immunity and reates a cause of action for plaintiffs ho are injured due to road defects, rovided that plaintiffs give notice of njury within thirty days, is consistent ith the due process provisions of the nited States Constitution.

2. Whether this Court should onsider the constitutionality of a ssachusetts statute limiting the ount of damages in cases of injuries sulting from road defects, where that sue was neither before the court below r decided by it.

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| A. The Decision Below Correctly Applies the Decisions of This Court Concerning Time Limitations in Statutes Abrogating Sovereign Immunity. | 6 |
| B. The Decision Below Correctly Applies the Decisions of This Court Applying the Due Process Clause to State-Created Property Rights | 11 |
| REGARDING THE ISSUE OF DAMAGES, THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW TO DECIDE AN ISSUE THAT WAS NEITHER BEFORE THE COURT BELOW NOR CONSIDERED BY IT. | 20 |
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F MASSACHUSETTS,
PUBLIC WORKS,
CHARLTON

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DICIAL COURT
ACHUSETTS

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BRIEF IN OPPOSITION

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within thirty days of the event. Although this notice requirement is a condition precedent to filing suit, the actual statute of limitations for such a suit is three years from the date of injury.

## REASONS FOR DENYING THE PETITION

Under Supreme Court Rule 10, "[a] review on writ of certiorari is not a matter of right but of judicial discretion, [and] will be granted only where there are special and important reasons therefore." The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. In Re Woods, 143 U.S. 202, 206 (1892).

For the reasons set forth below, Ram's petition does not satisfy the traditional criteria which guide the Court's discretionary review. Accordingly, the petition should be denied.

## I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

Ram seeks review pursuant to Rule 10.1(c) of this Court, allowing review "when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." As will be shown below, the decision of the

Massachusetts Supreme Judicial Court is completely consistent with the decisions of this Court. Moreover, the decision below raises no unsettled federal questions.

A. The Decision Below Correctly Applies the Decisions of This Court Concerning Time Limitations in Statutes Abrogating Sovereign Immunity.

This case concerns a presentment or notice requirement contained in the very statute which waives the state's sovereign immunity and permits suits against the state under certain circumstances. It is not disputed that the statutes here at issue, M.G.L. c. 81, §18, and c. 84 §§15 and 18, create causes of action which did not exist at common law. As the court below held in this case,

> Before the statutes were enacted, all claims against government entities for injuries caused by defects in public ways were barred by the doctrine of sovereign immunity. When the Legislature waived this immunity...it established limitations and conditions on that waiver.

Ram, Pet. at 78-79, 409 Mass. at 490, 567 N.E. 2d at 213-214.

In United States v. Kubrick, 444 U.S. 111 (1979), this Court considered an essentially identical challenge to the presentment provision in the Federal Tort Claims Act, 28 U.S.C. §2401(b). The Court held:

> The Act waives the immunity of the United States and...in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended See Soriano v. United States, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957);

Id. at 117-118. Emphasis added.

In Soriano v. United States 352
. 270, 276 (1957), a case concerning
laim filed under 28 U.S.C. §2501 by a
eign national for reimbursement for
time service to the United States the
rt held,

> And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.

at 276.

While not unmindful that this rule
on occasion create harsh results,
Court emphasized, "this Court can
orce relief against the sovereign
within the limits established by
gress." Id. at 277. 1/ The

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Plaintiff does not claim that any
ergence of authority or confusion
ng the lower federal courts or the
te courts exists regarding the issues

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plicit, but nevertheless clear teaching

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ised by the petition, and it would pear there is none. See, e.g., Fenton Citizens Savings Association. 400 F. atute creating cause of action which d not exist at common law, failure to mply with time limitation deprives urt of jurisdiction over the subject tter); Kalmich v. Bruno 553 F.2d 549, 3 (7th Cir., 1977) (limitation ntained in statute creating rights not tant at common law is not statute of mitation in normal sense and time ement is integral part of enactment); uendo v. Insurance Co. of Puerto Rico, 3 F. Supp. 1030, 1035-1036 (D.P.R., 74) (notice period for tort claims ainst municipalities does not violate e process or equal protection arantees); United States v. Southern ific Co., 210 F. Supp. 760, 762 (N.D. 1962) (expiration of time itation in statute creating right known at common law extinguishes right sue, not merely remedy); Faucher v. urn, 465 A. 2d 1120, 1124 (Me. 1983) vereign immunity abrogated only as ressly provided by statute); Budahl Gordon and David Associates, 287 N.W. 489, 493 (S.D. 1980) (Same); Herman Magnuson, 277 N.W. 2d 445, 454 (N.D. 9) (notice requirement in tort claims tute is rationally related to islative goals and does not deny al protection); Gosner v. Board of

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ubrick and Soriano is that limitations
eriods in statutes modifying sovereign
mmunity do not affect due process
uarantees (See Section "B", below).
ecause the Massachusetts statute
epresents the state's voluntary
imitation of its sovereignty, failure
o comply with the statute's notice
equirement cannot constitute a

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footnote continued)

ommissioners for Owen County, 177 Ind.
pp. 79, 378 N.E. 2d 425, 428 (1978)
ame); Fritz v. Regents of University
Colorado, Colo., 196 Colo. 335, 586
2d 23, 25 (1978) (Same); Panko v.
unty of Cook, 42 Ill. App. 3d 912, 356
E. 2d 859, 862 (1976) (Same); Paulsey
Chaloner, 54 App. Div. 2d 131, 388 of
pp. 874, 879 (1975) (where
me-barring provision is part of very
Y.S. 2d 35, 37-38 (1976) (notice
quirement in tort claims statute does
t deny equal protection or due
ocess); 51 Am. Jur. 2d, Limitations
Actions, §15 and cases cited therein,
cluding state court decisions of
orida, Georgia, Illinois, Kansas,
ntucky, Maryland, Michigan, Minnesota,
lahoma, South Dakota, Tennessee,
rmont, Washington, Wisconsin.

deprivation of Ram's rights. Simply put, Ram has no rights without the statute, and, therefore, has no rights beyond those granted by the statute.

B. The Decision Below Correctly Applies the Decisions of This Court Applying the Due Process Clause to State-Created Property Rights.

Ram asserts that the thirty day presentment requirement violates her rights to procedural and substantive due process. In fact, as set forth above, because the statutes at issue partially abrogate sovereign immunity, the conditions of that abrogation form part of the substantive right granted and are constitutionally permissible. In arguing otherwise, Ram misunderstands this Court's cases.

Ram relies principally on Logan v. Zimmerman Brush, Co., 455 U.S. 422

Logan involved an Illinois
nt discrimination statute which
the administrative agency to
within 120 days of the filing
plaint, a fact-finding
ce to investigate the employee's
In Logan, the employee committed
dural missteps but the agency
iled to convene the required
e within the 120 day period.
ployee's subsequent suit
he employer under the statute,
ois Supreme Court upheld the
of the employer's motion to
ased on the agency's failure to
nvene the fact-finding
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Court reversed the Illinois
ourt, holding that the 120-day
n was not a substantive element
sic right conferred by the



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but merely "a procedural
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n is in no way inconsistent with
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case. While Logan involved a
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ch was entirely out of the
of the Plaintiff, the present
olves a notice requirement which
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d, part and parcel of the
n's abrogation of immunity.[2/]

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n and the present case differ in
critical way. The 120-day
issue in Logan was clearly
to benefit the
plaintiff by requiring the
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ously. When the fact finding
e was not convened within 120
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t to his own benefit. Faced
irony, this Court held that

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eld in Arnett v. Kennedy
53-54 (1974), "[w]here
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California, 444 U.S.
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haracterized as a
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ain true that the
n fashioning its own
is paramount to any
interest, except
in protecting the
from state action

that is wholly arbitrary or irrational." Id. at 282. Because the Massachusetts statute is neither wholly arbitrary nor irrational, the decision below is consistent with this Court's decisions and, therefore, plaintiff's petition should be denied.

Finally, Ram's claim that certiorari is warranted because her case was decided on the basis of "a short statute of limitations and not on the merits", Pet. at 2, and because the court below did not "entertain her alternative legal theory", Pet. at 42, raises no substantial federal issue and should be rejected.

The court's action was indeed decided based on her failure to comply with the notice requirements of the Massachusetts statute. But entry of judgment for failure to comply with

"procedural" steps is judicial action of the most common sort. Beyond the obvious conclusion that a litigant who fails to comply with procedural requirements is not entitled to judgment "on the merits", no more need be said.

Ram's claim that the court below "did not entertain her alternate legal theory", Pet. at 42, is equally without merit, both as a factual matter and as a ground for this Court's review. Ram's claim, in essence, is that the court below was incorrect in its decision as to which of two state statutes applied to her case. Far from not "entertaining" her claim, the court below devoted the majority of its opinion to an exhaustive analysis of the applicability of the two statutes. Ram, Pet. at 65-76, 409 Mass. at 485-489, 567 N.E. 2d at 211-213. The court's

rejection of Ram's "alternate" theory of the case does not, of course, create any federal issue for this Court's review.

## II. REGARDING THE ISSUE OF DAMAGES, THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW TO DECIDE AN ISSUE THAT WAS NEITHER BEFORE THE COURT BELOW NOR CONSIDERED BY IT.

Ram argues that this Court should grant certiorari to consider whether the limited damages provided for by the Massachusetts road defect statutes constitute a violation of her due process rights. Pet. 1-2, 38-39. This Court should reject Ram's petition on this issue because the question of damages was not before the court below.

This case was decided in the Massachusetts trial courts on two motions for summary judgment (one motion brought by the town and one by the state defendants) on the issue of whether her failure to provide notice within 30 days

as required by G.L. c. 84 §18 barred her action. The Massachusetts Superior Court found that her failure to provide the statutory notice did indeed bar her claim and accordingly allowed both summary judgment motions. Ram, Pet. at 61-63, 409 Mass at 483-484, 567 N.E. 2d at 210. Petitioner appealed these decisions to the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court, sua sponte, transferred the case from the Appeals Court. Ram, Pet. at 67, 409, Mass at 481, 567 N.E. 2d at 208. Thus, the only issues properly before the Supreme Judicial Court concerned the validity of the notice period contained in Massachusetts G.L. c.84, §18. Petitioner's attempt to argue the validity of the damage limitations of the road defect statutes was explicitly rejected by the Supreme Judicial Court:

> The plaintiff also contends that the $5,000 liability limit of G.L. c. 84, §15 and the $4,000 liability limit of G.L. c. 81, §18, violate equal protection and due process guarantees. Summary judgment was properly granted on the issue of liability; the issue of damages is not before us.

Ram, Pet. at 80, 409 Mass at 491, n. 9, 567 N.E. 2d 214, n.9. Emphasis added.

The issue of the validity of the statutes' damage limitations was simply not before the court. Petitioner, in essence, asks this Court to presume that the court below would have ruled in a particular way if it had considered the issue at all, which it did not. Rather, the issue remains, in effect, preserved for the Massachusetts Supreme Judicial Court to decide in an appropriate future case.4/

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4/ Presumably, such a case would be one in which, at a minimum, the notice requirements were complied with and the record revealed evidence of damages beyond the statutory limit.

der these circumstances,
oner's request for certiorari
as to the issue of the
tutionality of the statute's
limitations must be denied.

## CONCLUSION

r the reasons set forth above, the
on for a writ of certiorari should
ied.

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF THE COMMONWEALTH
OF MASSACHUSETTS

David Hofstetter
Judith Fabricant*
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(617) 727-2000

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July 18, 1991

(3)

Supreme Court, U.S.
FILED
JUL 23 1991
OFFICE OF THE CLERK

No. 90-1948

# In the

# Supreme Court of the United States

OCTOBER TERM, 1991

MARY T. RAM,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF TRANSPORTATION,
COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WORKS,
TOWN OF CHARLTON,
REPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT, TOWN OF CHARLTON

EDWARD P. HEALY*
FRANCIS R. FECTEAU
JANET E. KAUFMAN
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484 Main Street, Suite 560
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(508) 791-6287

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

## Questions Presented.

Whether a state statute which imposes a thirty day present-eriod as a condition precedent to suing a municipality ries allegedly incurred as a result of a defect in a public rationally related to a legitimate state interest.

Whether a state statute which imposes a thirty day pre-nt period as a condition precedent to suing a municipal-injuries allegedly incurred as a result of a defect in a way violates the Due Process Clause of the Fourteenth ment to the United States Constitution.

Whether the Court should exercise its certiorari jurisdic-review the constitutionality of a state statute which a $5,000 damage cap when the petitioner has neither d a finding of liability against the municipality nor l an award in excess of the damage limitation.

Whether a $5,000 damage cap for injuries allegedly as a result of a defect in a public way is rationally o a legitimate state interest.

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CASES.


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United State (1938)
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ON PETITION FOR WRI
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## BRIEF I
## PETITION FOR
## OF RESPONDEN

### Judg

The decision of the Sup
in *Ram* v. *Charlton*, is rep
208 (1991).

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TIORARI TO THE SUPREME
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SITION TO
OF CERTIORARI
N OF CHARLTON

elow.

cial Court of Massachusetts
09 Mass. 481, 567 N.E.2d

## Statutes Involved.

statutes cited in the Petition, Respondent
vites the Court's attention to the following

### eral Laws, c. 84, § 19

**ice.**

shall be in writing, signed by the
or by someone in his behalf, and may
ne case of a county, to one of the
sioners or the county treasurer; in the
the mayor, the city clerk or treasurer;
town, to one of the selectmen or to
or treasurer. If the person injured dies
required for giving the notice, his
dministrator may give such notice
ys after his appointment. If by reason
mental incapacity it is impossible for
ed to give the notice within the time
y give it within thirty days after such
been removed, and if he dies within
his executor or administrator may
within thirty days after his appoint-
n of written communication signed
o injured, or by some person in his
is executor or administrator, or by
behalf of such executor or adminis-
ntains the information that the person
giving the name and place of resi-
rson injured and the time, place and
ury or damage, shall be considered
ce.

## Massachusetts Genera

**Instituting claims actions.**

A civil action s
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chapter unless the c
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final denial of such
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which such cause of
any claim by the ex
ployer shall not be
or amount of damag

### Staten

This is a Petition for Ce
of the Supreme Judicial Co
T. Ram, is a resident of H
setts. Respondent, Town o
in Worcester County, Ma
wealth of Massachusetts D
partment of Public Works,
ment with offices in Bosto

. 258, § 4

**denial; limitation of**

be instituted against a
for damages under this
nall have first presented
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**ne Case.**

eking to reverse the decision
ssachusetts. Petitioner, Mary
mpshire County, Massachu-
, is a municipal corporation
ts. Respondents, Common-
t of Transportation and De-
rtments of the state govern-
k County, Massachusetts.

Petitioner, Mary T. Ram, alleges that on the night of November 18, 1983, she was driving south on Route 31, Dresser Hill Road, in the Town of Charlton. During the course of that evening, Ms. Ram had visited friends and had consumed a small amount of alcohol. The single-car accident occurred when Ms. Ram failed to maintain control of her vehicle and went off the road. There were no witnesses. Because no depositions were taken, the cause of the accident is unknown, despite Petitioner's bald assertion that "The accident was caused solely by the unexpected and dangerous contour of the Road." (Petition at 22). As a result of the accident, Ms. Ram suffered serious injuries and was hospitalized for several months.

On March 29, 1985, Petitioner sent a letter to the Board of Selectmen of the Town of Charlton purporting to give notice of a claim under M.G.L. c. 258, § 2, the Massachusetts Tort Claims Act. (See Petition at 18-20 for the text of the statute subjecting a municipality to liability for negligence.) Under M.G.L. c. 258, § 4, a claimant must make presentment of the claim within two years of the date of the accident. On November 14, 1986, suit was filed in Suffolk Superior Court against the Town of Charlton and the Commonwealth of Massachusetts Departments of Transportation and Public Works alleging negligent design, construction and maintenance of Route 31, Dresser Hill Road, in Charlton, improper lighting of the road, failure to warn users that the road was dangerous, improper determination and posting of speed limits along Route 31 and breach of unnamed express or implied warranties.

On July 8, 1988, Respondent, Town of Charlton, filed a Motion for Summary Judgment with accompanying Brief and Affidavits. The Town argued that Petitioner's injury was cognizable only under M.G.L. c. 84, § 15 governing injuries resulting from a defect in the way. A "defect" is defined as "anything in the state or condition of the way that renders it unsafe or inconvenient for ordinary travel." *Trioli* v.

ss. App. Ct. 394, 397, 446 N.E.2d 92, 94
. *Worcester*, 383 Mass. 707, 708, 421 N.E.2d
(1981). Massachusetts General Laws c. 84,
esentment of a notice of claim under § 15
s after the alleged injury. Once notice has
designated authorities, the plaintiff has three
ne the action accrues to file suit. In the Motion
gment, Respondent Town of Charlton argued
id not given notice of her claim within the
and thus was barred from bringing suit. The
ed on November 22, 1988 (Petition at 82-85).
1989, the other defendants filed a similar
nary Judgment on the ground that Petitioner
mply with a similar notice requirement in
8. The second Motion was allowed on April
ls from the allowances of the motions were
case was entered on the docket of the Mas-
ls Court on July 31, 1989. The Supreme
noved the case *sua sponte* and affirmed the
perior Court (Petition at 56-81). A petition
ore the Supreme Judicial Court was denied
91 (Petition at 86). The present Petition for
d on June 22, 1991.

**Summary of Argument.**

a Writ of Certiorari challenges the constitu-
ections of a state statute imposing a thirty
ment for presentment of claims for injuries
cts in a public way and limiting the amount
erable against the municipality in whose
blic way lies. Respondent Town of Charlton

violate the Due Process
nt because it does not de-
t or affect her as a member

ly related to the legitimate
wns to keep their ways in
bility. Respondent further
sion of the statute is not
not receive a finding of
nt in excess of the damage
ooses to decide the issue,
e limitation is also ration-
conserving municipal re-
recovery for those injured
ns drawn between those
e injured by other forms
ner's Fourteenth Amend-

NOT BURDEN A FUNDA-
PECT CLASS NEED ONLY
LEGITIMATE STATE IN-
ESS CHALLENGE.

med to be constitutional.
. *Murgia*, 427 U.S. 307,
to convince the courts of
dgments." *Minnesota* v.
456, 464 (1981). Rather,
of a state statute bears a

heavy burden of convi
the Due Process Clause
*Express Agency, Inc.* v.
When a state statute d
affect a suspect class,
*Co.*, 304 U.S. 144, 15
determine whether the
a legitimate state intere
*Board* v. *Fritz*, 449 U.
at 319, Marshall, J.,
U.S. 1, 17 (1979); *New*
(1976). "The term 'ratio
that an impartial law
classification would se
transcends harm to the
'rational' . . . includes
that must always ch
sovereign's duty to gove
*Living Center, Inc.*, 47
concurring. If the statut

There is no allegation
of a "suspect class," as t
*Products, Co.*, 304 U.
tionality). Thus, the case
of limitations for provin
are inapposite. Illegitim
a quasi-suspect class, re
for discrimination agai
*Brown*, 462 U.S. 1, 7 (
is warranted for statutes
*Id.* at 8; *Mills* v. *Hablu*

Petitioner attempts to
several fundamental righ

e violates
t. *Railway*
12 (1949).
al right or
*Products*,
need only
elation to
*Retirement*
427 U.S.
*gers*, 440
297, 303
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*Pickett* v.
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U.S. at 378; *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434, 437 (1982). The state may erect reasonable procedural requirements for adjudication, *id.*, at n.7, such as statutes of limitation, *United States* v. *Kubrick*, 444 U.S. 111, 117, 125 (1979); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), statutes of repose and presentment periods, which limit access to a hearing on the merits. It is also worth noting that Petitioner was given a full and fair opportunity to be heard in the Superior Court and the Supreme Judicial Court. *Cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 337 U.S. 306, 314 (1950). She was ably represented by counsel at the two motion hearings and in oral argument before the full Supreme Judicial Court of Massachusetts (Petition at 87-113). At those hearings, she had the opportunity to present her theory of the case. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). That the Courts did not agree with her does not indicate a denial of due process.

Thirdly, Petitioner argues that she has been denied a fundamental property right by being prevented from pursuing her claim against the Town of Charlton to trial (Petition at 33, 41). It is true that the state may not destroy a property interest without first giving the putative owner an opportunity to present her claim. *Zimmerman Brush Co.*, 455 U.S. at 434; *Wolff* v. *McDonnell*, 418 U.S. 539, 557-558 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970). Property interests protected by the Due Process Clause of the Fourteenth Amendment extend beyond real estate, chattel or money. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 571-572 (1972). However, to have a property interest in something, a person must have more than an abstract need or desire for it. "He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. In the instant case, Petitioner has no more than a tort claim which might or might not entitle her to recover damages from the town

if her injuries are d
in a public way. T
entitled to the protec
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property right in Fa
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to welfare benefits)
*cation of the City of*
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obtain a permissible
U.S. 117, 122 (192
sovereign immunity
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444 U.S. at 117-118
Claims Act); *Black* v
(Statute of Limitatio
in fashioning its ow
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wholly arbitrary or c
455 U.S. at 433; *Ma*
283 (1980); *Ferri* v
Even if Petitioner w
requirement a statut
held that statutes of
*Donaldson*, 325 U.S

upheld them as valid exercises of
444 U.S. at 117, 125, *Donaldson*,
*North Dakota*, 466 U.S. at 257;
S. at 139, when they do not affect
ct classes. Thus, petitioner has not
of any property right entitled to

cked on Fourteenth Amendment
es not merit heightened scrutiny,
slature's determination concerning
e. *Friedman* v. *Rogers*, 440 U.S.
, 427 U.S. at 303. The Legislature
a particular problem in one piece
. *Lee Optical Co. of Oklahoma*,
*Silver* v. *Silver*, 280 U.S. at 123.
ically consistent in every respect
to be constitutional. *Williamson*
*oma*, 348 U.S. at 487-488. If any
bly be conceived to have existed
d the statute which would demon-
p between the act and a legitimate
facts must be assumed to have
*road Retirement Board* v. *Fritz*,
*nesota* v. *Clover Leaf Creamery*
e Court has held: "[T]he judiciary
ture to judge the wisdom or desira-
leterminations made in areas that
rights nor proceed along suspect
*Dukes*, 427 U.S. at 303.

urt of Massachusetts employs the
deciding Fourteenth Amendment
he United States Supreme Court.
*Fruit Co., Inc.*, 388 Mass. 228,
983); *Boston* v. *Keene Corp.*, 406

Mass. 301, 305, 547 N.E.2d 328, 332 (1989); *Zeller* v. *Cant*
395 Mass. 76, 83-84, 478 N.E.2d 930, 934 (1985). The S
preme Judicial Court rejected Petitioner's due process arg
ments, holding that the thirty day notice requirement of M.G.
c. 84, § 18 was rationally related to a permissible legislati
objective (Petition at 79); *Klein* v. *Catalano*, 386 Mass. 70
712, 437 N.E.2d 514, 52[illegible] (1982). The statute is part of
comprehensive legislative scheme to limit governmental liabi
ity for injuries due to defects in public ways while affordi
those injured a vehicle to recover. *Whalen* v. *Worcester Ele*
*tric Light Co.*, 307 Mass. 169, 174-175, 29 N.E.2d 763, 76
(1940). Massachusetts General Laws c. 84 also imposes a
obligation on the municipality to keep its ways in good repai
*See* Section 1. To do so, it must have prompt notice of th
defect to evaluate the necessity and cost of repair and to preve
others from being injured. The thirty day notice provisio
serves those legitimate governmental objectives. Also, th
municipality has a duty to its citizens to conserve its resource
Section 15 allows a city or town to set aside funds for th
payment of meritorious claims. It further protects the muni
ipality against claims which may prove to be fraudulent bu
are nonetheless litigated to the full extent. *Trioli* v. *Sudbur*
15 Mass. App. Ct. at 396, 446 N.E.2d at 94; *Cf. Lodge*
*District Attorney for Suffolk County*, 21 Mass. App. Ct. 27
283, 486 N.E.2d 764, 768 (1985), *rev. den.* 396 Mass. 110
488 N.E.2d 1199 (1986) (purposes of presentment requireme
of Massachusetts Tort Claims Act).

Petitioner expresses skepticism of the reasons articulated b
respondent and adopted by the Supreme Judicial Court justif
ing the statute as a valid exercise of legislative power (Petitio
at 35-36). This argument misinterprets the standard by whic
state statutes are evaluated for constitutionality. The reason
given by the Court in its interpretation need not have actuall
existed at the time the legislation was enacted. If the facts upo

, such as the thirty days required by M.G.L.
necessary for injuries allegedly caused by
ays. While the legislative distinctions may
or a particular claimant, her resort is to the
e courts. *Vance* v. *Bradley*, 440 U.S. 93,

that it is irrational to subject those severely
of defects in a public way to a thirty day
persons injured by other forms of municipal
o years in which to present their claims to
icials. She also argues that claimants who
ntaged by the notice provision, while the
ho have died are given a longer time to
r M.G.L. c. 229, § 2, the Wrongful Death
t 45-48). The statute, however, contains a
ves it from attack as irrational. Massachu-
c. 84, § 19 provides in part: "If by reason
al incapacity it is impossible for the person
notice within the required time, he may
y days after such incapacity has been re-
oner never attempted to invoke this clause
he requirements of Section 18. At the very
tion 19 would have raised a genuine issue
ich might have precluded the allowance of
on for Summary Judgment and given her
merits which she now claims was denied.

D NOT REVIEW A STATUTE LIMITING DAM-
BLE AGAINST A MUNICIPALITY WHEN THE
NOT RECEIVED A FINDING OF LIABILITY
WN.

o not issue advisory opinions. They deal
egal issues presented in actual cases. *United*

tected from damage claims .
victim's recovery in highwa
*Brookfield*, 97 Wis.2d 356, 3

In the past, the Supreme Ju
tional challenges to the dama
§ 2 and the Sovereign Imm
§ 85K. In *Hallett* v. *Wrent*
N.E.2d 1189, 1193 (198
$100,000.00 damage cap of
all claims stemming from a s
did not violate either the Du
Clause of the Fourteenth Am
that the plaintiffs did not hav
damages which would compe
*Id.* at 557, 499 N.E.2d at 119
v. *New England Medical C*
N.E.2d 329, 333-334 (1989)
damage limitation of the Ma
Statute. While the Court con
against a charity may be lo
and the cost of litigating medi
it nonetheless found that the
Process Clause. Moreover, t
not the judiciary's role to eq
plaintiffs and defendants. *Id*
the amount of damages recov
that change should come fro
This Court cannot declare th
out of sympathy for Petitione

**Conclusion.**

Wherefore, for the foregoing reasons, Respo
Charlton, asks this Court to deny the Petiti
Certiorari.

Respectfully submitted,

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JANET E. KAUFMAN
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